argued that the prosecutor improperly vouched for the credibility of his principal witness, Vega. (Appendices C, G)

On 6-16-00, the Court of Appeals denied Mr. Rodriguez' appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that it did not have to decide whether the government proved beyond a reasonable doubt that a 5,000 pound shipment seized hundreds of miles away from the alleged importation point in Puerto Rico was the marijuana involved in Mr. Rodriguez' case and for which he was sentenced. (Appendix C)

On 6-26-00, this Court handed down it's decision in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00).

In spite of the *Apprendi* decision, counsel did not file a petition for rehearing or a motion to stay the mandate arguing the *Apprendi* violation. Shortly before the due date for a petition for Writ of Certiorari, Mr. Rodriguez was advised that his counsel also would not be filing a petition for Writ of Certiorari.

On 1-22-01, Mr. Rodriguez filed a pro se out of time petition for Writ of Certiorari. In response, ***the government conceded that Mr. Rodriguez' constitutional rights were violated under Apprendi and also conceded that his case should be remanded for reconsideration in light of Apprendi if the Court found the petition timely***. (Appendix G6-G8)

On 4-23-01, the Court denied Mr. Rodriguez' petition for Writ of Certiorari. (Appendix F)

On 9-19-01, Mr. Rodriguez filed a motion pursuant to 28 U.S.C. § 2255 in the District Court alleging, *inter alia*, ineffective assistance of counsel in failing to file a petition for rehearing or a motion to stay the mandate arguing the *Apprendi* violation. More specifically, Mr. Rodriguez pleaded:

6.) Mr. Rodriguez proceeded to trial. (Appendix, Exhibits C)[1]

7.) At trial, the evidence was riddled with lies, half-truths, innuendoes, inferences from inferences and questionable circumstantial evidence.

8.) More specifically, the *material* evidence consisted of the testimony of Witness Francisco Vega-Estrada which included his testimony as to uncharged alleged conduct by Mr. Rodriguez and prior events as to which Mr. Rodriguez had been previously found not guilty. It also included Mr. Vega-Estrada's unsupported allegations that Mr. Rodriguez had recruited him to off load approximately 5,000 pounds of marijuana on 9-30-93 into his little pickup truck (Tr. 5-11-98, pages 108-111) which had a rated "payload" of only 1,000 pounds. (Appendix, Exhibit H). This little pickup truck, according to marijuana experts from prison, would not have been able to *discreetly* haul more than a *fraction* of even 1,000 pounds due to the bulky nature of marijuana and would have certainly been unable to haul more than a *fraction* of 5,000 pounds due to its light suspension.[2] Finally, the '*material*' evidence included the *opinion* and *conclusion* of Mr. Vega-Estrada, based solely on his own *speculation*, that a seizure of marijuana which he heard about over the radio, which occurred on the date of his allegedly planned offloading (9-30-93) but which occurred 4 days sailing time from his

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[1] This refers to Exhibits C attached to and incorporated in the motion pursuant to 28 U.S.C. § 2255.

[2] See Appendix, Exhibits H.

alleged offloading point, was the shipment which Mr. Rodriguez allegedly hired him to offload. (Tr. 5-11-98, pages 113-114) The government's only attempt to verify the quantity of marijuana allegedly involved in the alleged marijuana importation scheme detailed by Mr. Vega-Estrada, was to provide testimony that no other 5,000 pound seizures of marijuana were made any closer to the alleged offloading point on that date.[3] Since no marijuana was ever seized in the alleged scheme, the foregoing speculative evidence was the sole basis for the determination of relevant conduct for Mr. Rodriguez at sentencing. (Appendix, Exhibits F)

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14.) On 5-15-98 Mr. Rodriguez was found guilty by the jury as to violations of 21 U.S.C. § 963 ... (Count 1); 21 U.S.C. § 963 and 18 U.S.C. § 2 ... (Count 2). (Appendix, Exhibits B, C)

15.) On 11-20-98, Mr. Rodriguez was sentenced to 188 months incarceration plus 5 years supervised release for violations of 21 U.S.C. § 963 (conspiracy to import in excess of 5,000 pounds of marijuana) (Count 1); 21 U.S.C. § 963 and 18 U.S.C. § 2 (Aiding & Abetting attempt to import in

[3] See Appendix, Exhibit I-11. Using this outrageous formula, it would have been just as reasonable to attribute a seizure of 100,000 pounds from a ship in Southeast Asia on that date, had such a shipment been intercepted by authorities and had Mr. Vega-Estrada picked the number "100,000 pounds" of marijuana out of the air. Such 'logic' would have been just as 'reasonable' since both scenarios were equally impossible in the real world.

excess of 5,000 pounds of marijuana) (Count 2) This sentence represented relevant conduct involving 5,000 pounds of marijuana. The sentencing findings of the Court were made under the "preponderance of evidence" standard and caused Mr. Rodriguez' sentence to be imposed under 21 U.S.C. § 960(b)(3) instead of 21 U.S.C. § 960(b)(4) which had and has a statutory maximum of 5 years incarceration. The findings also caused Mr. Rodriguez' sentence of supervised release to be imposed under 18 U.S.C. § 3583(b)(1) instead of 18 U.S.C. § 3583(b)(2). (Appendix, Exhibits A-C)

16.) The sentence received by Mr. Rodriguez included and necessarily involved an increase in his maximum sentence based upon facts not submitted to a jury and not proven beyond a reasonable doubt as hereinafter more fully appears.

17A.) Mr. Rodriguez was sentenced on the basis of drug quantity but the sentence cannot logically be construed as a "default sentence" under 21 U.S.C. § 960(b)(4).

* * * * * * * * * * *

18.) Even viewing the evidence in the light most favorable to the verdict,[4] based upon the evidence submitted at trial, upon which the jury might have relied, a rational jury could have found that his alleged offense, if it occurred at all, involved less than 50 kilograms of marijuana.

19.) At trial, the evidence was insufficient to establish, beyond a reasonable

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[4] Mr. Rodriguez does ***not*** concede that he was guilty or that the evidence was sufficient to convict him.

doubt, every fact necessary to increase Mr. Rodriguez' sentence to 188 months incarceration plus 5 years supervised release.

20.) At sentencing, the evidence was insufficient to establish, beyond a reasonable doubt, every fact necessary to increase Mr. Rodriguez' sentence to 188 months incarceration plus 5 years supervised release. Moreover, the findings of the Court at sentencing were made under the "preponderance of evidence" standard and were based, at least in part, on evidence which would not have been admissible in proceedings before a jury.[5]

21.) At trial, no special jury verdict was requested by the government or presented to and returned by the jury to establish every fact necessary to increase Mr. Rodriguez' sentence to 188 months incarceration plus 5 years supervised release. (Appendix, Exhibits I-9 thru I-10)

22.) At trial, the jury was not instructed to find every fact necessary to increase Mr. Rodriguez' sentence to 188 months incarceration plus 5 years supervised release. More specifically, the jury was never instructed by the Court to find the amount of controlled substance which was involved in the allegations set forth in his indictment. Certainly, the jury was never instructed by the Court to find the amount of controlled

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[5] *United States v. Westmoreland*, 2001 U.S. App. LEXIS 2295 (7th Cir. 2-15-01) (vacating sentence where evidence used to enhance statutory maximum sentence was not admissible at trial and could not, therefore, have been presented to the jury)

substance "beyond a reasonable doubt"... In fact, the jury was specifically instructed that it could find Mr. Rodriguez guilty if the jury did not find that 5,000 pounds of marijuana was involved in Mr. Rodriguez alleged offense and if the jury simply determined that a "detectable amount" of controlled substance was involved in the allegations set forth in his indictment.

23.) But for the failures to properly submit all facts relevant to the increase in Mr. Rodriguez' statutory maximum sentence to the jury, there is a reasonable probability that Mr. Rodriguez would have been sentenced to a substantially lower sentence.

24.) But for the failure to require proof beyond a reasonable doubt, by the Court and jury, as to all facts relative to the increase in Mr. Rodriguez' statutory maximum sentence, there is a reasonable probability Mr. Rodriguez would have been sentenced to a substantially lower sentence.

25.) New counsel for Mr. Rodriguez filed a direct appeal. On 6-16-00, the Court of Appeals issued its opinion denying the appeal. The Court's mandate was issued on 7-7-00.

* * * * * * * * * * *

30.) On 6-26-00, the Supreme Court handed down its decision in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00). This decision constituted a "change in the law" which affected Mr. Rodriguez conviction and/or sentence by requiring a redefinition of the "elements" of his crime and by holding that his statutory maximum sentence could not be enhanced by facts not pleaded in

indictment, not submitted to a jury, and not proven beyond a reasonable doubt.

31A.) Since this decision was handed down before the time expired for filing a petition for rehearing on 6-30-00, before the Court of Appeals issued its mandate on 7-7-00, and before the time expired for filing a petition for Writ of Certiorari with the Supreme Court, the *Apprendi* decision was and is applicable to him and his case.[6]

31B.) When Mr. Rodriguez heard about the *Apprendi* decision from other prisoners, he promptly brought the case to appellate counsel's attention and asked him to file a further appeal of his conviction and/or sentence.

32.) In spite of the fact that *Apprendi* was retroactively applicable to Mr. Rodriguez' case and a petition for rehearing could have been and should have been filed by counsel, counsel did not move the Court of Appeals for rehearing, did not move the Court of Appeals to recall the mandate and did not file a petition for Writ of Certiorari with the Supreme Court. Instead, shortly before 9-13-00, counsel advised Mr. Rodriguez that he was not going to file anything more in his case.

33.) When Mr. Rodriguez received the information that counsel declined any further work on his case, Mr. Rodriguez prepared a pro se motion for extension of time to file a petition for Writ of Certiorari with the Supreme Court. He placed this motion in the

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[6] *United States v. Murray*, 2001 U.S. App. LEXIS 443 (6th Cir. 1-9-01) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987))

prison mail collection box on 9-13-00 from the prison where he is incarcerated. On 10-5-00, the Clerk issued a letter declining to file the 9-13-00 motion for extension of time. A second pro se motion for extension of time was deposited in the prison mail collection box on 10-18-00 by Mr. Rodriguez from the prison where he is incarcerated. On 10-23-00, the Clerk issued a letter declining to file the 10-18-00 motion for extension of time. A pro se motion for extension of time, directed to Justice Souter, was deposited in the prison mail collection box on 12-1-00 by Mr. Rodriguez from the prison where he is incarcerated. On 12-15-00, the Clerk issued a letter declining to file the 12-1-00 motion for extension of time.

34.) When the Supreme Court Clerk of Court continued to decline to either file or allow a ruling on the motion for extension of time, Mr. Rodriguez mailed a petition for Writ of Certiorari to the Supreme Court alleging violation of his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00). This petition was filed with a "time question" notation and the government was ordered to respond to the petition.

* * * * * * * * * * *

36.) On 4-23-01, the Supreme Court denied certiorari without comment as to any reasons what-so-ever. (Appendix, Exhibit G)

37.) Mr. Rodriguez provided counsel with complete and accurate information and did not place any restrictions on counsel

38.) Mr. Rodriguez relied completely and in all material respects on the advice of counsel.

39.) Mr. Rodriguez is "actually innocent" of the sentence imposed and for which he is presently "in custody".

CLAIM NUMBER ONE

40.) Mr. Rodriguez restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-39 herein.

41.) Mr. Rodriguez' conviction and/or sentence is violative of his Sixth Amendment constitutional right to effective assistance of counsel in the direct appeal process as hereinafter more fully appears.

42.) Counsel could have but did not file a supplemental citation of authority with the Court of Appeals or move that Court for supplemental briefing on the applicability of *Apprendi*, based on the Supreme Court's grant of certiorari in *Apprendi v. New Jersey*, 528 U.S. 1018; 120 S. Ct. 525; 145 L. Ed. 2d 407; 1999 U.S. LEXIS 7695 (11-29-99).

43.) Counsel could have but did not file a supplemental citation of authority with the Court of Appeals or move that Court for supplemental briefing on the applicability of *Apprendi* based on the briefs on the merits filed in *Apprendi* on 1-13-00.

44.) Counsel could have but did not file a supplemental citation of authority with the Court of Appeals or move that Court for supplemental briefing on the applicability of *Apprendi* based on the oral argument of *Apprendi* on 3-28-00. The transcript of this oral argument was available to counsel

through either WESTLAW or Lexis within 15 days of the argument.

45.) Counsel could have but did not petition the Court of Appeals for rehearing, or move to recall the mandate based on the Supreme Court's decision on the merits in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) which was handed down during the pendency of his direct appeal.

46.) Counsel could have but did not petition the Supreme Court for a Writ of Certiorari based on the Supreme Court decision on the merits in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00).

47.) Counsel's omissions set forth in ¶¶42-46 were based on an incomplete investigation of the law relevant to Mr. Rodriguez' direct appeal process.

48.) Counsel could have but did not ***timely*** investigate or familiarize himself with the Supreme Court docket where *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) had been granted certiorari and was decided prior to the conclusion of his direct appeal process during the litigation of Mr. Rodriguez' direct appeal.[7]

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[7] The direct appeal process is not complete and the defendant's sentence is not final until the time expires for petitioning the Supreme Court for certiorari or until the Supreme Court rules on a petition for Writ of Certiorari. *Kapral v. United States*, 166 F.3d 565 (3rd Cir. 1999); *United States v. Burch*, 202 F.3d 1274; 2000 U.S. App. LEXIS 1211

49.) Counsel could have but did not timely investigate the applicability of *Apprendi* to the facts of Mr. Rodriguez' case.

50.) Counsel's omissions set forth in ¶¶42-49 were not the result of reasoned decisions based on strategic or tactical choices among all plausible options available to counsel for the defense of Mr. Rodriguez during the direct appeal process.

51.) Counsel's omissions set forth in ¶¶42-49 were the result of counsel's **abdication** of the duty and responsibility to advocate Mr. Rodriguez' case and cause during the direct appeal process.

52.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶42-51 because absent said omissions, there is a reasonable probability that the outcome of his direct appeal process would have been different. More specifically, but for counsel's unprofessional omissions there is a reasonable probability that Mr. Rodriguez would have had his sentence vacated by the Court of Appeals.

53.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel,

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(10th Cir. 2000); *United States v. Garcia*, 210 F.3d 1058; 2000 U.S. App. LEXIS 8581 (9th Cir. 2000); *United States v. Lacey*, 162 F.3d 1175 (10th Cir. 1998); *United States v. United States v. Gamble*, 208 F.3d 536, 2000 U.S. App. LEXIS 6905 (5th Cir. 2000); United *States v. Cuch*, 79 F.3d 987, 991 [n. 9] (10th Cir. 1996) ("by 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *Ross v. Artuz*, 150 F.3d 97, 98 (2nd Cir. 1998).

set forth in ¶¶42-51 because absent said omissions, there is a reasonable probability that the outcome of his direct appeal process would have been different. More specifically, but for counsel's unprofessional omissions there is a reasonable probability that Mr. Rodriguez would have been sentenced to a substantially lower sentence; a sentence of no more than the 5 year statutory maximum of 21 U.S.C. § 960(b)(4).

54.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶42-51 because said omissions deprived him of preservation of his right to retroactive application on direct appeal of his claim of violation of his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00)

55.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶42-51 because said omissions deprived him of his procedural and substantive right to have any increase in his statutory maximum sentence be based solely upon facts submitted to the jury and proven beyond a reasonable doubt; procedural and substantive rights to which the Fifth and Sixth Amendments entitled him.

56.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶42-51 because said omissions undermine confidence in the reliability of his direct appeal process.

57.) Mr. Rodriguez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶42-51 because said omissions

> constitute "structural error" in the direct appeal process which is not subject to harmless error analysis.

(CR 181) (Section 2255 motion, Statement of Claim, ¶¶6-8, 14-17A, 18-25, 30-34, 36-57)

On 9-28-04, the District Court denied the motion pursuant to 28 U.S.C. § 2255. In denying the motion, the District Court held, *contrary to the record*[8], that the evidence was overwhelming as to drug quantity. While the District Court ostensibly analyzed "prejudice" to Mr. Rodriguez from the ineffective assistance of counsel claim under *Apprendi*, that court was unable to analyze "prejudice" to Mr. Rodriguez for sentencing under mandatory guidelines in violation of *United States v. Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05) for the reason that *Booker* had not yet been decided. Consequently, the District Court did not address the enhancement to Mr. Rodriguez' sentence for role in the offense utilizing mandatory guidelines and judge found facts to determine relevant conduct.(Appendix D)

A timely Notice of Appeal and Request for Certificate of Appealability was filed.

On 1-26-05, the District Court denied the Request for Certificate of Appealability. (Appendix E)

On appeal from the denial of the motion pursuant to 28 U.S.C. § 2255, Mr. Rodriguez specifically argued, *inter alia*, that his constitutional rights to effective assistance of counsel on direct appeal were violated by counsel's failure to file a petition for rehearing or a motion to stay the mandate arguing the *Apprendi* violation. Mr. Rodriguez specifically argued that the District Court erred in failing to address

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[8] See Appendix C11 where the Court of Appeals declined on direct appeal to find that the government proved drug quantity beyond a reasonable doubt. It is unclear how drug quantity could be "overwhelming" yet fail to be proven "beyond a reasonable doubt".

"prejudice" in his claim of ineffective assistance of counsel in light of *Booker*.

On 1-12-06, the Court of Appeals denied Mr. Rodriguez' appeal of the denial of his motion pursuant to 28 U.S.C. § 2255. (Appendix A)

In denying a Certificate of Appealability, the Court of Appeals held, *contrary to the record below*[9], that the evidence of drug quantity was "overwhelming" so the *Apprendi* violation was harmless error. Neither the Court of Appeals nor the District Court analyzed "prejudice" to Mr. Rodriguez under *United States v. Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05) for the sentencing under mandatory guidelines based on judge found facts as to Mr. Rodriguez' ostensible "role in the offense" which were neither pleaded in the indictment nor presented to the jury much less found beyond a reasonable doubt. (Appendix A, D)

Mr. Rodriguez demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the First Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[9] *Id.*

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. RODRIGUEZ' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).[10] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

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[10] See also *GAO A v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

1A.) Counsel's Failure To Timely File A Petition For Rehearing Or Motion To Stay The Mandate Due To The Obvious *Apprendi* Violation At Sentencing Was Not Only Professionally Unreasonable, Viewed As Of The Time Of Counsel's Conduct, But Prejudiced Mr. Rodriguez Under Both The Law At The Time Of The Appeal And Also Viewed With The "Hindsight" Of *Booker*.

On 6-26-00, this Court held in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00), that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

On 6-29-00, the Court handed down its decision in *Carless Jones v. United States*, 2000 U.S. LEXIS 4518 (6-29-00), where the Court vacated and remanded *Carless Jones v. United States*, 194 F.3d 1178; 1999 U.S. App. LEXIS 29751 (10th Cir. 2000)) for reconsideration in light of *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00). Significantly, *Carless Jones* was a case in which the defendant was charged with violation of 21 U.S.C. § 841(a) with penalty specified under 21 U.S.C. § 841(b)(1)(C) in the indictment. The defendant had been convicted and sentenced to two concurrent sentences of 30 years each. The sentencing factors were found by the District Court on the basis of the Court's preponderance of the evidence determinations pursuant to the Sentencing Guidelines. On Appeal, the defendant argued that based upon *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215, 1228 (1999), his sentence of 30

years was unlawfully based upon facts which were not charged in indictment. He also argued that the sentence was unlawfully increased by facts not proven beyond a reasonable doubt, and facts not properly presented to the jury. While the Tenth Circuit rejected each of these arguments, this Court vacated and remanded. *Id.*

While counsel would have had to avoid newspapers, television, and all forms of legal news to have avoided hearing about the Court's *Apprendi* decision, counsel simply **abdicated** his responsibility to do anything at all to attempt to obtain the benefit of *Apprendi* for Mr. Rodriguez. No petition for rehearing, no motion to stay the mandate, no petition for Writ of Certiorari with this Court. Counsel didn't even advise Mr. Rodriguez until a few days before a petition for Writ of Certiorari was due to be filed on 9-14-00 that counsel had simply quit the case. During the 90 days from 6-16-00 to 9-14-00 when counsel was doing nothing what-so-ever for Mr. Rodriguez, the various courts of appeals, including the First Circuit Court of Appeals vacated and remanded numerous sentences for resentencing in light of *Apprendi*.[11] These cases included remands under the plain error standard of Fed. R. Crim. P. 52.[12]

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[11] *United States v. Nordby*, 225 F.3d 1053; 2000 U.S. App. LEXIS 22776 (9th Cir. 9-11-00); *United States v. Mojica-Baez*, 229 F.3d 292; 2000 U.S. App. LEXIS 22232 (1st Cir. 8-30-00); *United States v. Rebmann*, 226 F.3d 521; 2000 U.S. App. LEXIS 21756 (6th Cir. 8-28-00); *United States v. Meshack*, 225 F.3d 556; 2000 U.S. App. LEXIS 21955 (5th Cir. 8-28-00); *United States v. Wilson*, 2000 U.S. App. LEXIS 21416 (10th Cir. 8-23-00); *United States v. Greer*, 285 F.3d 158; 2000 U.S. App. LEXIS 38679 (2nd Cir. 8-14-00)

[12] *United States v. Nordby*, 225 F.3d 1053; 2000 U.S. App. LEXIS 22776 (9th Cir. 9-11-00); *United States v. Mojica-Baez*, 229 F.3d 292; 2000 U.S. App. LEXIS 22232 (1st Cir. 8-30-00); *United States v. Meshack*, 225 F.3d 556; 2000 U.S.

Based on the foregoing, counsel's performance was professionally unreasonable and below the objective standard of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) viewed as of the time of counsel's conduct.[13]

While the lower courts ostensibly addressed the "performance" prong of the *Strickland* test, both of the lower courts' performance evaluations were predicated on their perception that Mr. Rodriguez was not prejudiced under *Strickland* because those courts believed Mr. Rodriguez could not have established "plain error" under Fed. R. Crim. P. 52. Consequently, the lower courts in this case did not address "performance" at all. They addressed "prejudice".[14]

While Mr. Rodriguez argued below and respectfully submits to this Court that the evidence of drug quantity was

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App. LEXIS 21955 (5th Cir. 8-28-00); *United States v. Wilson*, 2000 U.S. App. LEXIS 21416 (10th Cir. 8-23-00);

[13] See *Hicks v. United States*, 2005 U.S. App. LEXIS 2962 (6th Cir. 2-18-05) (ineffective assistance of counsel for failure to timely raise *Apprendi* issue shortly after Supreme Court's decision in *Apprendi* on 6-26-00); *United States v. Gholson*, 2003 U.S. Dist. LEXIS 10914 (ND IL 6-26-03) (counsel's performance below objective standard of *Strickland* where *Apprendi* decided while direct appeal pending, but counsel failed to raise *Apprendi* issue in the Court of Appeals); *Ballard v. United States*, 400 F.3d 404; 2005 U.S. App. LEXIS 4002 (6th Cir. 2005) (same); *United States v. Hollis*, 191 F. Supp. 2d 1257; 2002 U.S. Dist. LEXIS 5640 (D KS 2002) (same).

[14] For purposes of the "performance" analysis under *Strickland*, the Court presumes that counsel's failures were at least potentially prejudicial to the defendant. *Kimmelman v. Morrison*, 477 U.S. 365, 387, 390-91, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986)

anything but overwhelming[15] and was certainly controverted,[16] and that he was, therefore, "prejudiced" under *Apprendi* within the meaning of *Strickland*, the lower courts decided to the contrary by holding that he would not have been able to establish "plain error" on remand from a successful petition for Writ of Certiorari with this Court. (Appendix A) (Appendix D)

While Mr. Rodriguez respectfully submits that the lower courts erred in holding that he could not have demonstrated "plain error" under *Apprendi*, further error is apparent from the lower courts' "prejudice" determinations. This is because neither the District Court nor the Court of Appeals addressed "prejudice" in light of the interplay between *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993) and *United States* v. *Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

In *Lockhart* v. *Fretwell*, this Court specifically held that "prejudice" under *Strickland* is determined through "hindsight" based on current understanding of the law. *Id.* See *Mayo* v. *Henderson*, 13 F.3d 528, 534 (2nd Cir. 1994) (same -- defendant prejudiced under *Strickland* in light of favorable clarification in law subsequent to disputed proceeding).[17]

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[15] See Appendix C11 where the Court of Appeals declined on direct appeal to find that the government proved drug quantity beyond a reasonable doubt. It is unclear how drug quantity could be "overwhelming" yet fail to be proven "beyond a reasonable doubt".

[16] *Id.*

[17] *Ballard* v. *United States*, 400 F.3d 404; 2005 U.S. App. LEXIS 4002 (6th Cir. 2005) (ineffective assistance of counsel claim for failure to raise '*Apprendi* issue' analyzed under both *Booker* and *Apprendi*); *Lewis* v. *Dretke*, 355 F.3d 364; 2003 U.S. App. LEXIS 26156 (5th Cir. 2003) (citing Westley v. *Johnson*, 83 F.3d 714, 723 (5th Cir. 1996) (citing *Lockhart*

Consequently, under *Lockhart* v. *Fretwell*, the lower courts were mandated to determine whether Mr. Rodriguez was prejudiced under *Booker* through sentencing under mandatory guidelines and enhancement to those mandatory guidelines based on judge found facts.

While Mr. Rodriguez' sentence was partially predicated on relevant conduct involving 5,000 pounds of marijuana, the sentence was also enhanced from a Total Offense Level of 32 to a Total Offense Level of 36 under mandatory guidelines based on the judge found 'fact' that he "was the organizer of the criminal activity which involved five or more participants". (Transcript of Sentencing 11-20-98, page 24)

Under this Court's decision in *Lockhart* v. *Fretwell*, the lower courts were required to determine "prejudice" in light of current understanding of the law. This means they were required to determine "prejudice" under *Strickland* in light of *Booker*. *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993).[18]

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v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993)) ("prejudice", contrary to the "performance" test of *Strickland*, is measured by "hindsight"); *McKee* v. *United States*, 167 F.3d 103; 1999 U.S. App. LEXIS 1390 (2nd Cir. 1999) (same); *Prou* v. *United States*, 199 F.3d 37; 1999 U.S. App. LEXIS 32827 (1st Cir. 1999) (same); *Everett* v. *Beard*, 290 F.3d 500; 2002 U.S. App. LEXIS 8733 (3rd Cir. 2002) (same). Stated another way, the determination whether Mr. Rodriguez was "prejudiced" within the meaning of *Strickland* is whether his underlying *Apprendi*, *Blakely* & *Booker* claims are meritorious in light of the current law. *Id.*

[18] *Mayo* v. *Henderson*, 13 F.3d 528, 534 (2nd Cir. 1994) (same -- defendant prejudiced under *Strickland* in light of favorable clarification in law subsequent to disputed proceeding); *Ballard* v. *United States*, 400 F.3d 404; 2005 U.S. App. LEXIS 4002 (6th Cir. 2005) (ineffective assistance of counsel claim for failure to raise '*Apprendi* issue' analyzed under

Because the lower courts did not make even a perfunctory analysis under *Booker* or *Lockhart* v. *Fretwell*, the courts did not properly decide Mr. Rodriguez' claim of ineffective assistance of counsel.

Based on the foregoing, this Court should GRANT certiorari, VACATE the Court of Appeals decision and REMAND to the lower court for reconsideration in light of *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993) and *United States* v. *Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

1B.) This Court Should Grant Certiorari To Clarify The Relationship Between The "Hindsight" Application Of Clarified Law Under *Lockhart* v. *Fretwell* And The Retroactivity Principles Of *Teague* v. *Lane*.

As set forth above, In *Lockhart* v. *Fretwell*, this Court specifically held that "prejudice" under *Strickland* is

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both *Booker* and *Apprendi*); *Lewis* v. *Dretke*, 355 F.3d 364; 2003 U.S. App. LEXIS 26156 (5th Cir. 2003) (citing Westley v. *Johnson*, 83 F.3d 714, 723 (5th Cir. 1996) (citing *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993)) ("prejudice", contrary to the "performance" test of *Strickland*, is measured by "hindsight"); *McKee* v. *United States*, 167 F.3d 103; 1999 U.S. App. LEXIS 1390 (2nd Cir. 1999) (same); *Prou* v. *United States*, 199 F.3d 37; 1999 U.S. App. LEXIS 32827 (1st Cir. 1999) (same); *Everett* v. *Beard*, 290 F.3d 500; 2002 U.S. App. LEXIS 8733 (3rd Cir. 2002) (same). Stated another way, the determination whether Mr. Rodriguez was "prejudiced" within the meaning of *Strickland* is whether his underlying *Apprendi*, *Blakely* & *Booker* claims are meritorious in light of the current law. *Id.*

determined through "hindsight" based on current understanding of the law. *Id.* See *Mayo v. Henderson*, 13 F.3d 528, 534 (2nd Cir. 1994) (same -- defendant prejudiced under *Strickland* in light of favorable clarification in law subsequent to disputed proceeding).[19]

In *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), the Court held that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement. 489 U.S. at 310, 109 S. Ct. at 1075.

In other words, a new rule of law can be applied retroactively in collateral review under *Lockhart* v. *Fretwell* but not under *Teague v. Lane*.

To the extent that these two decisions are in conflict, the Court may want to clarify their relationship. This is especially true in light of Mr. Rodriguez' case because the lower courts here have sidestepped the issue to the detriment of Mr. Rodriguez. While it's rare to find a defendant in the circumstance of Mr. Rodriguez where counsel's performance

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[19] *Ballard v. United States*, 400 F.3d 404; 2005 U.S. App. LEXIS 4002 (6th Cir. 2005) (ineffective assistance of counsel claim for failure to raise '*Apprendi* issue' analyzed under both *Booker* and *Apprendi*); *Lewis v. Dretke*, 355 F.3d 364; 2003 U.S. App. LEXIS 26156 (5th Cir. 2003) (citing Westley v. *Johnson*, 83 F.3d 714, 723 (5th Cir. 1996) (citing *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993)) ("prejudice", contrary to the "performance" test of *Strickland*, is measured by "hindsight"); *McKee v. United States*, 167 F.3d 103; 1999 U.S. App. LEXIS 1390 (2nd Cir. 1999) (same); *Prou v. United States*, 199 F.3d 37; 1999 U.S. App. LEXIS 32827 (1st Cir. 1999) (same); *Everett v. Beard*, 290 F.3d 500; 2002 U.S. App. LEXIS 8733 (3rd Cir. 2002) (same). Stated another way, the determination whether Mr. Rodriguez was "prejudiced" within the meaning of *Strickland* is whether his underlying *Blakely* claim is meritorious in light of the <u>current</u> law. *Id.*

was below the objective standard of *Strickland* and he was prejudiced under a subsequent clarification of the law such as occurred between *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) and *United States v. Booker*, 543 U. S. ____, 125 S Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05), the situation is not unheard of. To the extent that Mr. Rodriguez' case is unusual, this should not be the grounds to deny him equal application of the laws and justice under the Sixth Amendment.

Based on the foregoing, this Court should GRANT certiorari and set the case for argument to define the relationship between *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993) and *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).

1C.) It Is Uncontested That There Were Substantive Violations Of *Apprendi*, *Blakely*, And *Booker* In Mr. Rodriguez' Case.

As set forth above, it is uncontested that Mr. Rodriguez' sentence is violative of *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) and *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403, 2004 U.S. LEXIS 4573 (6-24-04) and *United States v. Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

To the extent that this Court may want to address whether these cases are retroactive as ***substantive*** claims under the Sixth Amendment, Mr. Rodriguez' case would be an appropriate case in light of the uncontested nature of the Sixth Amendment violations.

CONCLUSION

For all of the foregoing reasons, Petitioner Israel Rodriguez respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of his Request for Certificate of Appealability and **REMAND**[20] to the court of appeals for reconsideration in light of *Lockhart* v. *Fretwell*, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993) and *United States v. Booker*, 543 U. S. ____, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

Chris Kokkinakos, Esq.
Counsel for Petitioner
17600 Northland Park Ct.
Southfield, MI 48075
Phone: 248-552-8900

Date: _____

[20] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

ISRAEL RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX

COMES NOW PETITIONER Israel Rodriguez and submits the attached appendix pursuant to Supreme Court Rules.

Chris Kokkinakos, Esq.
Counsel for Petitioner
17600 Northland Park Ct.
Southfield, MI 48075
Phone: 248-552-8900

Date _____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT DATED 1-12-06

UNITED STATES COURT OF APPEALS
For the First Circuit
No. 04-2660
ISRAEL RODRIGUEZ,
Petitioner, Appellant
v.
UNITED STATES,
Respondent, Appellee.

Before
Lynch, Lipez and Howard,
Circuit Judges.

JUDGEMENT
Entered: January 12, 2006

Israel Rodriguez has requested a certificate of appealability ("COA") to challenge the district Court's denial of his claims, in his § 2255 petition, that he received ineffective assistance of counsel at trial and on appeal. Since the correctness of the district court's denial of the petitioner's claims is not reasonably debatable, the request for a COA is denied. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

First, as the district court correctly concluded, Rodriguez's appellate counsel was not ineffective for failing to raise an Apprendi issue on direct appeal. According to Rodriguez, his 188-month sentences violated Apprendi, a case decided before his direct appeal became final, because the sentences were based on a drug quantity determination made by the court, not by the jury. But, as the district court explained, there was overwhelming evidence that, during the time frame described in the indictment, the conspiracy encompassed a quantity of marijuana sufficient to trigger a statutory maximum above the 188-month sentence(s) Rodriguez actually received. Since Rodriguez's appellate counsel could not have demonstrated that the Apprendi affected the fairness, integrity, or public reputation of the

judicial proceedings, he could not have demonstrated plain error. See United States v. Cotton, 535 U.S. 625, 633-34 (2002); United States v. Nelson-Rodriquez, 319 F.3d 1, 18 (1st Cir. 2003); cf. United States v. Perez-Ruiz, 353 F.3d 1, 18. Rodriguez's appellate counsel was not deficient for failing to raise an Apprendi claim that was unlikely to succeed. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Smith v. Murray, 477 U.S. 527, 535-36 (1986).

Second, the correctness of the district court's decision to deny Rodriguez's claim that he received ineffective assistance at trial because of his trial counsel's "actual conflict of interest" is not reasonably debatable. To succeed on an "actual conflict" claim of ineffective assistance, Rodriguez must show that (1) his trial counsel could have pursued a plausible alternative defense strategy or tactic, and (2) the alternative strategy or tactic was inherently in conflict with, or not undertaken, due to his attorney's other interests or loyalties. Familia-Consoro, 160 F.3d at 764; Carey v. United States, 50 F.3d 1097, 1100 (1st Cir. 1995). The alleged conflict must consist of something more than an "attenuated hypothesis having little consequence to the adequacy of representation." Carey, 50 F.3d at 1100. Here, the crux of Rodriguez's claim is his allegation that trial counsel "chose to concern herself with her own problems" rather than to challenge "the evidentiary basis for the existence and quantity of marijuana which was alleged in the indictment and to which Mr. Vega-Estrada had testified during trial." The record shows overwhelming admissible evidence of the existence and quantity of marijuana, so it is difficult to know what counsel should have done. This allegation is simply too speculative to support his claim, especially since the district court observed that his trial counsel "was always well-prepared" and "tested the prosecution's case zealously even in the face of overabundant evidence." Cf. United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992) (claim that attorney's attention may have been "diverted" by his

disqualification while representing defendant in another prosecution was too speculative).

The petition for COA is DENIED, and the appeal is terminated.

By the Court:
Richard Cushing Donoran, Clerk.
By: Margaret Carter
Chief Deputy Clerk.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ENTERED 12-4-98

ENTERED DECEMBER 02, 1998

UNITED STATES DISTRICT COURT
JUDICIAL DISTRICT OF PUERTO RICO
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
ISRAEL RODRIGUEZ
(Name of Defendant)

Case Number: 3:97CR0161-01(JF)
Defendant's Attorney: MARIA SANDOVAL, ESQ.

THE DEFENDANT:
[] pleaded guilty to count _____
[x] was found guilty on count(s) ONE AND TWO after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve in the following offenses:

Title & Section: 21:963
Nature of Offense: CONSPIRAC TO IMPORT MARIJUANA
Date Offense Concluded: 10-93
Count Number(s): ONE AND TWO

The defendant is sentenced as provided in pages 2 through 4 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[] Count(s)_____dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $50.00, for counts ONE & TWO FOR A

TOTAL OF $100 which shall be due [x] immediately [] as follows.
IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 580-56-2846
Defendant's Date of Birth: 12/13/1937
Date of imposition of Judgement: November 20, 1998
U.S. Marshal No.: 43577004
Defendant's Mailing Address: 10234 S.W. 130th COURT MIAMI, FLORIDA 33186.
Defendant's Residence Address: Same as above.

Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
JOSE ANTONIO FUSTE, USDJ
Date:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED EIGHTY EIGHT (188) MONTHS AS TO EACH COUNT TO BE SERVED CONCURRENTLY WITH EACH OTHER.

[x] The Court makes the following recommendations to the Bureau of Prisons:
THAT DEFENDANT BE ALLOWED TO SERVE HIS IMPRISONMENT TERM IN AN INSTITUTION IN MIAMI OR IN THE SOUTH EASTERN PORTION OF THE UNITED STATES.

[] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district

[] _____ on _____

[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by 2 p.m. on _____

[] as notified by the United States Marshal.

[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATESMARSHAL

By

_____

Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) years AS TO EACH COUNT TO BE SERVED CONCURRENTLY WITH EACH OTHER.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[x] The defendant shall not unlawfully possess controlled substances, and shall refrain from possessing firearms, as defined in 18 U.S.C. Section 921, or other dangerous weapons. (Check, if applicable.)

The defendant shall refrain from the unlawful use of controlled substance and submit to a drug test within 15 days of release on supervised release, and at least two tests thereafter when so requested by the Probation Officer. If any such tests detect substance abuse, the defendant, at the discretion of the Probation Officer, shall participate in a substance abuse treatment program arranged and approved by the Probation Officer, until duly discharged by authorized program personnel, with the approval o the Probation Officer.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the is judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

STATEMENT OF REASONS

[x] The Court adopts the factual findings and guideline application in the presentence report.

OR

[] The Court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Guideline Range Determined by the Court:
Total Offense Level: 36
Criminal History Category: I
Imprisonment Range: 188 to 235 months
Supervised Release Range: to 5 years.
Fine Range: $20,000.00 to $4,000,000.00
[x] Fine waived or below the guideline range because of inability to pay.
Total Amount of Restitution: _____
[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).
[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to

be stated, pursuant to Chapters 109A, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[] The sentence departs from the guideline range:

[] upon motion of the government, as a result of defendant's substantial assistance.

[] for the following specific reason(s):

SENTENCING FINDINGS

On May 15, 1998, the defendant, ISRAEL RODRIGUEZ, was found guilty by jury trial as to Counts One and Two of the Indictment in Criminal Case No. 97-161, which charged violations to 21 U.S.C. §§ 963, 952(a), and 18 U.S.C. § 2.

Pursuant to the provisions of USSG § 3D1.2(d), the counts of conviction have been grouped together on the basis of the quantity of substance involved. Based on the amount of marijuana attributed to the defendant, specifically 5,000 lbs., and the provisions of USSG § 2D1.1, a base offense level of 32 was determined. Since the defendant was the organizer/leader of the criminal activity which involved five or more participants, a four-level increase is warranted,

pursuant to USSG § 3B1.1(a). There are no other applicable guideline adjustments.

Based on a total offense level of 36 and a Criminal History Category of I, the guideline imprisonment range in this particular case is from 188 to 235 months, with a fine range of $20,000 to $4,000,000, plus a supervised release term of five years.

Therefore, the court sentenced the defendant to be imprisoned under the custody of the Bureau of Prisons for a term of 188 months as to each count, said terms to be served concurrently with each other.

Having considered the defendant's financial condition, a fine was not imposed.

Upon release from confinement, the defendant shall be placed on supervised release for a term of five years as to each of counts One and Two, to be served concurrently with each other, under the following terms and conditions:

1. The defendant shall not commit any crimes, federal, state or local, and shall comply with the standard conditions of supervised release promulgated by the United States Sentencing Commission and adopted by this Court.

2. The defendant shall not unlawfully possess controlled substances.

3. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one dru9 test within the first fifteen days of release on supervised release, at least two periodic tests thereafter, and whenever requested by the U.S. Probation Officer. If any such samples detect substance abuse, that the defendant participate in a substance abuse treatment program arranged and approved by the probation officer until duly discharged by authorized program personnel with the approval of the U.S. Probation Officer.

Pursuant to Title 18, U.S. Code, Section 3013, a special monetary assessment of $50.00 was also imposed as to each count, for a total of $100.

San Juan, Puerto Rico, this 20th day of November, 1998.

JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX C

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT
DATED 6-16-00

UNITED STATES, Appellee, v. ISRAEL RODRIGUEZ, Defendant, Appellant. UNITED STATES, Appellee, v. JUAN M. SANIEL-CALZADA, Defendant, Appellant. UNITED STATES, Appellee, v. MANUEL RODRIGUEZ-SANTANA, Defendant, Appellant

No. 99-1030, No. 99-1031, No. 99-1032
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
215 F.3d 110; 2000 U.S. App. LEXIS 14141; 54 Fed. R. Evid. Serv. (Callaghan) 1128
June 16, 2000, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied April 23, 2001, Reported at: 2001 U.S. LEXIS 3266.

PRIOR HISTORY: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Jose Antonio Fuste, U.S. District Judge.

DISPOSITION: Judgments AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed from a judgment of the United States District Court for the District of Puerto Rico which convicted and sentenced defendants on charges of conspiracy and attempt to import more than 5,000 pounds of marijuana under 21 U.S.C.S. §§ 952(a), 963, and 18 U.S.C.S. § 2.

OVERVIEW: Defendants appealed a district court judgment following a jury verdict which convicted and sentenced defendants on charges of conspiring to import more than 5,000 pounds of marijuana in violation of 21 U.S.C.S. §§ 952(a), 963 and of attempting to import more than 5,000 pounds of marijuana in violation of 21 U.S.C.S. §§ 952(a), 963, and 18 U.S.C.S. § 2. The court of appeals

affirmed defendants' convictions and sentences. The court found that the fact that defendants' effort failed did not preclude the jury from finding that the defendants had conspired together to import marijuana. In addition, the court noted that there was a striking similarity between the acts alleged in the indictment and prior incidents involving defendants. Accordingly, the court concluded that the district court did not abuse its discretion in deciding that the probative value of the evidence of the defendants' participation in other drug offenses was more substantial than its prejudicial effect.

OUTCOME: Judgments affirmed convicting and sentencing defendants on charges of conspiring and attempting to import marijuana where the fact that defendants' effort failed did not preclude the jury from finding that the defendants had conspired together to import marijuana.

COUNSEL: G. Richard Strafer, with whom G. Richard Strafer, P.A. was on brief, for appellant Israel Rodriguez.

Manuel San Juan, by appointment of the Court, for appellant Juan M. Saniel-Calzada.

Rafael F. Castro-Lang, by appointment of the Court, for appellant Manuel Rodriguez-Santana.

W. Stephen Muldrow, Assistant United States Attorney, with whom Guillermo Gil, United States Attorney, Jorge E. Vega-Pacheco, Chief, Criminal Division, and Camille Velez-Rive, Assistant United States Attorney, were on brief, for appellee.

JUDGES: Before Lynch, Circuit Judge, Campbell, Senior Circuit Judge, and O'Toole, Jr., * District Judge.

* Of the District of Massachusetts, sitting by designation.

OPINIONBY: O'TOOLE

OPINION: [*114]

O'TOOLE, District Judge. These are consolidated appeals from judgments of conviction entered upon jury

verdicts. The defendants make a number of arguments. After considering their points carefully, we are satisfied that there was no reversible error, and accordingly we affirm the judgments.

I.

The [**2] defendants, Israel Rodriguez ("Rodriguez"), Juan Saniel-Calzada ("Saniel"), and Manuel Rodriguez-Santana (here called "Santana" to distinguish him from Israel Rodriguez), were charged and convicted of conspiring to import more than 5,000 pounds of marijuana in violation of 21 U.S.C. § 952(a) and 21 U.S.C. § 963 (Count One), and of attempting to import more than 5,000 pounds of marijuana in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 2 (Count Two). At trial, there was evidence that could have convinced the jury of the following facts:

In September, 1993, Rodriguez, who lived in Florida, contacted Francisco Vega Estrada ("Vega"), a resident of Puerto Rico, to enlist his aid in smuggling illegal drugs into Puerto Rico. Rodriguez was unaware that Vega was then cooperating with agents of the United States Customs Service. (Vega eventually became the government's key witness at trial.) Rodriguez planned to bring a shipment of marijuana from Colombia into Puerto Rico by sea. He sought to have both Vega and Saniel help off-load the marijuana when it arrived. [**3]

On September 29th or 30th, Vega and Saniel, having agreed to assist in the drug importation, went to a pier in a location designated by Rodriguez on the eastern coast of Puerto Rico to await the boat that was carrying the marijuana. n1 Vega brought his pickup truck, onto which he and Saniel planned to load the marijuana. They waited through the night, under surveillance by Customs agents, but no boat arrived.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The location was identified by various general place names, including Ceiba, Las Carmelas Beach, and Marinata. These places are all near enough to each other that

there appears no significance to the variation for present purposes.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Early in the morning, they heard a radio report that a boat carrying more than 5,000 pounds of marijuana had been seized that night by the Coast Guard. Apparently, the boat had been seized about 45 miles off the coast of Colombia, a good distance away from Puerto Rico and particularly from its eastern coast. n2 In any event, Vega testified that he assumed that the load that [**4] was seized was the one he and Saniel were waiting for, and he went home to bed. He heard later from Rodriguez that the expected shipment had "fallen through." Vega understood that remark at the time to mean that the shipment had been intercepted.

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n2 The Coast Guard towed the boat to the Roosevelt Roads Naval Base in Puerto Rico, where it arrived on October 4, 1993. An agent testified that it took four days to tow the boat from its point of seizure, suggesting that it was seized on or about September 30. There was no evidence as to how long it would have taken the boat to travel to Puerto Rico under its own power.

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Rodriguez organized a second attempt to import marijuana in October, 1993, this time involving not only Vega and Saniel, but also Santana and a couple of other men. The plan was for the marijuana to be received at sea off the island of St. Thomas, not far from Maternillo on the [*115] east coast of Puerto Rico. The men traveled to St. Thomas in two boats, one of which was captained by Santana, who was a fisherman [**5] working out of Maternillo. In St. Thomas, they stayed at apartments owned by a man identified only by his first name, "Fred." Vega testified that he overheard a conversation in St. Thomas in which, after some negotiation, Rodriguez agreed to pay Santana $ 400,000 for his assistance

in bringing the marijuana back to Puerto Rico in his boat.

After all the necessary preparations had been made, at some point Rodriguez announced to the others that the expected shipment had been "canceled." The defendants returned to Puerto Rico without completing the planned importation.

As noted, the chief government witness at trial was Vega. His evidence was supplemented, and in some respects corroborated, by testimony of Customs agents and by telephone records which supported an inference that there had been multiple phone contacts among all the various participants during the months of September and October, 1993.

Vega also was permitted to testify to "other crimes" committed by the defendants, pursuant to Fed. R. Civ. P. 404(b). n3 He described three other drug importation episodes in which one or more of the defendants were involved. One occurred in December, 1993, after the events alleged in [**6] the indictment. On that occasion, Vega met with Santana at "Fred's" apartment complex in St. Thomas. Together with others, they put out from St. Thomas in Santana's boat and picked up approximately 600 kilos of cocaine that was dropped to them from an airplane. They then brought the drugs to Puerto Rico by sea. n4

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n3 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b).

n4 Although Vega had previously been cooperating with the government, he testified that he participated in the December, 1993 episode not as an informant, but to make money. He was apparently annoyed that the government had not paid him for his information which had led to the seizure of marijuana in September, and he decided to make some money by helping with another drug deal.

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[**7]

Vega also testified that he had helped Rodriguez with two prior importations of marijuana into Puerto Rico from Colombia, one in 1978 or 1979, and the other in 1980. Saniel was also involved in the second. According to Vega, in the late 1970s he and Rodriguez were acquainted because both worked at the El Conquistador Hotel. Rodriguez approached him one day and solicited his help in bringing a shipment of marijuana from Colombia. Vega agreed to help, and took vacation time from work to be able to do so. Following Rodriguez's instructions, Vega and some others picked up a shipment of marijuana off the Colombian coast and sailed with it back to Puerto Rico, where Rodriguez met them and helped unload the marijuana at a dock in the middle of the night.

The second incident, in 1980, was similar. Vega and Rodriguez flew to Colombia where they met with a man named "Juan." Rodriguez and Juan had some discussions, after which Rodriguez told Vega that he had to go back to Puerto Rico to take care of a problem with some money. Vega remained in Colombia for a while, but eventually also returned to Puerto Rico. n5 Rodriguez met him and instructed him to [*116] go to a small island near Tortola, where [**8] some of the marijuana involved was hidden. There was a problem with the quality of the marijuana, and Rodriguez wanted a sample to take back to Colombia to prove the point to his supplier. Vega went with Saniel to the place were the marijuana was kept and took some of it back to Puerto Rico. They "stashed" it at Saniel's house. Of the three defendants,

only Santana offered evidence at trial, and that was his own testimony. He testified that he was a fisherman and would occasionally fish in the waters off St. Thomas. He denied ever having been to St. Thomas with Vega. He also said that Vega had been at his home performing some construction work during five days in late September, 1993, and he suggested that the telephone calls to his house from the other co-conspirators during that period were probably calls to Vega, not to him.

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n5 Vega had some visa problems, and he had to stay in Colombia to straighten them out. His airline tickets and some legal documents pertaining to his visa problems were offered in evidence to corroborate his testimony about his trip to Colombia. The exhibits themselves contain no reference to either Rodriguez or Saniel and thus do not directly corroborate that part of Vega's testimony.

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[**9]

Upon this evidence, the jury convicted each defendant on each count.

II.

We consider the defendants' arguments in turn.

A. Sufficiency of the Evidence

The defendants challenge the sufficiency of the evidence to convict them. n6 We assess whether the evidence viewed in a light most favorable to the verdict would allow a rational trier of fact to find guilt beyond a reasonable doubt. See United States v. Morillo, 158 F.3d 18, 22 (1st Cir. 1998). All evidence, both direct and circumstantial, is to be considered, with conflicts resolved in favor of the verdict. See United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997).

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n6 Saniel and Rodriguez challenge the sufficiency of evidence as to both counts. Santana only challenges the sufficiency of evidence as to Count Two.

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Conspiracy

To prove the crime of conspiracy under 21 U.S.C. § 963, the government must prove the existence of an unlawful agreement between two or more persons and the [**10] defendant's knowledge of and voluntary participation in the conspiracy. See Morillo, 158 F.3d at 23. To establish a defendant's voluntary participation, the government must show both "intent to agree and intent to commit the substantive offense." Id. (citations omitted). The crime is the illegal agreement; if there was such an agreement, it does not matter that the purpose of the agreement was not achieved, or even that achieving that purpose was factually impossible. See United States v. Giry, 818 F.2d 120, 126 (1st Cir. 1987).

If the jurors believed Vega, they could easily have found within his testimony evidence supporting the elements of the offense of conspiracy with respect to each defendant. Rodriguez formed the plan to import marijuana and recruited the others to help out. Both Saniel and Santana, by their respective parts as described by Vega, joined in the conspiracy knowing of its purpose and intending by their participation to bring about its success. The fact that their effort failed does not stand in the way of a finding by the jury that the defendants had conspired together to import marijuana.

Attempt (Aiding and Abetting) [**11]

To convict the defendants of attempt, the government had to prove that they intended to commit the substantive offense of importing marijuana and that each of them, directly or by aiding or abetting another, "performed a substantial step towards the completion of the offense." United States v. DeMasi, 40 F.3d 1306, 1315 (1st Cir. 1994). A "substantial step" is less than what is necessary to complete

the substantive crime, but more than "mere preparation." See United States v. Levy-Cordero, 67 F.3d 1002, 1019 (1st Cir. 1995). The government must [*117] prove that the defendants "participated in [the attempt] as . . . something [they] wished to bring about, and sought by [their] actions to make it succeed." United States v. Loder, 23 F.3d 586, 590-91 (1st Cir. 1994) (quoting United States v. Garcia-Rosa, 876 F.2d 209, 217 (1st Cir. 1989)).

Again, Vega's testimony, if believed, was sufficient to permit a jury to find the defendants guilty beyond a reasonable doubt. According to Vega's account, each of the defendants personally participated in at least one direct effort to import marijuana. Saniel went with Vega to the [**12] waterfront to await the shipment from Colombia in September; in October, Santana brought his boat to St. Thomas expecting to load it with marijuana to be carried back to Puerto Rico; Rodriguez participated in both efforts. On the evidence, the jury could properly have found, with respect to each defendant, that his participation went beyond "mere preparation" and amounted to a "substantial step" toward the completion of the offense.

Santana points out that the indictment alleged an attempt "in or about September of 1993." He argues that, except for records showing telephone calls to his home from the homes of other co-conspirators, there was no evidence that he participated in the effort to bring marijuana directly from Colombia in September. The only evidence of his participation was the October trip to St. Thomas. He therefore says that he cannot be found guilty of the attempt that is alleged in the indictment. His argument is meritless.

The words "in or about" permit some latitude in proving the time of the offense alleged, so long as the exact time of the commission of the act is not an element of the offense. See United States v. Antonelli, 439 F.2d 1068, 1070 (1st Cir. 1971). [**13] The exact time of the importation effort is not an element of the crime of attempting to import illegal drugs. Here, in addition to attempt, Santana was

charged with being part of a conspiracy which, according to the indictment, existed from "in or about September of 1993 to in or about October of 1993." Further, in the conspiracy count, there are specific allegations of "overt acts" that Santana participated in, all of which are alleged to have taken place in October, 1993.

Moreover, the evidence that during September telephone calls were made to Santana's residence from the other alleged co-conspirators also supported the attempt charge, because from it an inference might have been drawn not only that Santana had conspired with others to violate the law, which was the gist of the conspiracy count, but also that he participated in steps toward the commission of the substantive offense itself. Certainly, in a prosecution for a completed offense, evidence of communications among the co-conspirators would be relevant not only to prove the existence of the conspiracy but to prove that the substantive crime was committed as well. The same should be true when, instead of a completed substantive [**14] crime, an attempt is charged.

In any event, proof of Santana's active participation in October is sufficient proof of an offense "in or about September" that there is no error. See United States v. Escobar-de Jesus, 187 F.3d 148, 168 (1st Cir. 1999) (evidence about act occurring near the end of March supported proof of conspiracy alleged to have begun "on or about" April); United States v. Portela, 167 F.3d 687, 698 n.7 (1st Cir. 1999) (evidence of act occurring in early April 1995 could prove crime alleged to have occurred "on or about March 1995").

B. Constructive Amendment of the Indictment

The defendants have argued that it is unlikely -- and that the jury could not have found beyond a reasonable doubt -- that the marijuana seized off the coast of Colombia at the end of September was the marijuana that Vega and Saniel were waiting for at the pier at Las Carmelas. Accordingly, [*118] the defendants say, the government failed to prove a

fact alleged in the indictment, and thus the crime proved at trial was different from the one alleged in the indictment. They assert that the government's failure of proof, combined with the district court's instruction [**15] on the elements of conspiracy, amounted to a constructive amendment of the indictment.

A constructive amendment of the indictment would be a per se violation of the Fifth Amendment. See United States v. Fisher, 3 F.3d 456, 463 (1st Cir. 1993); see also Stirone v. United States, 361 U.S. 212, 215-19, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960). "A constructive amendment occurs when the charging terms of the indictment are altered" at trial so that they are different from those handed up by the grand jury. See Portela, 167 F.3d at 701 (citations and internal quotations omitted).

There was no such amendment here, even if the government did fail to prove that the marijuana seized off Colombia was the marijuana that was the subject of the conspiracy alleged in the indictment, a question we need not resolve. The conspiracy alleged in Count One was a conspiracy to import marijuana into Puerto Rico, not a conspiracy to dispose of the marijuana cargo of a particular vessel. The seizure of the ship off Colombia was alleged in the indictment not as a necessary element of the offense charged, and it was not necessary for the government to prove that [**16] the marijuana seized was the marijuana that Saniel and Rodriguez planned to import.

The government is not required to prove an overt act with respect to an importation conspiracy under 21 U.S.C. § 963, which contains language identical to the language of 21 U.S.C. § 846. See United States v. Shabani, 513 U.S. 10, 11-12, 130 L. Ed. 2d 225, 115 S. Ct. 382 (1994) (holding that no overt act need be proven with respect to conspiracy charged under § 846); United States v. Montgomery, 150 F.3d 983, 997-98 (9th Cir. 1998) (applying Shabani to 21 U.S.C. § 963); United States v. Rangel-Arreola, 991 F.2d 1519, 1522 n.2 (10th Cir. 1993)(noting " 21 U.S.C. . . . § 963 [does] not

contain the overt act requirement"); United States v. Burns, 990 F.2d 1426, 1432 (4th Cir. 1993) (same). It was proper for the government to argue that the jury did not need to find that the intercepted shipment was the subject of the conspiracy. The district court properly instructed the jury on the elements of the offense. See Portela, 167 F.3d at 702 [**17] (approving a jury instruction to disregard evidence of an overt act in a drug conspiracy indictment). There was no constructive amendment of the indictment.

C. Admission of Evidence of Other Crimes

The defendants argue that the district court improperly admitted Vega's testimony about other drug importation efforts in which one or more of them participated. They contend that the evidence was not relevant to a legitimate issue in the case, as required under Rule 404(b), and further, even if it was, the evidence was unfairly prejudicial and should have been excluded under Rule 403.

Their argument tracks the well-known two-step test for determining whether "other crimes" evidence may be admitted. First, the evidence must be "specially probative of an issue in the case -- such as intent or knowledge -- without including bad character or propensity as a necessary link in the inferential chain." United States v. Frankhauser, 80 F.3d 641, 648 (1st Cir. 1996) (citing United States v. Aguilar-Aranceta, 58 F.3d 796, 798 (1st Cir. 1995)). Second, before admitting it, the trial court must also determine that "the probative value of the evidence is substantially [**18] outweighed by the danger of unfair prejudice," potential confusion of the issues, or the possibility that the jury would be misled. See Aguilar-Aranceta, 58 F.3d at 798 (citations and internal quotations omitted).

We review the admission of such evidence for an abuse of discretion. [*119] See United States v. Gilbert, 181 F.3d 152, 160 (1st Cir. 1999); United States v. Shea, 159 F.3d 37, 40-41 (1st Cir. 1998).

Probative Value

Rule 404(b) precludes evidence of "other crimes" or "bad acts" to prove a defendant's bad character or his propensity to commit the crime alleged in the indictment. But it permits such evidence for other purposes, some of which are listed in the Rule.

Evidence of other criminal conduct has often been found "specially relevant" when it tends to prove one or more of the elements of the crime of conspiracy. See United States v. Scelzo, 810 F.2d 2, 4 (1st Cir. 1987); see also 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 404.22[5][b][ii] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2000) (collecting cases admitting 404(b) evidence in conspiracy cases). [**19] In a conspiracy prosecution, it is essential for the government to prove the defendant's knowledge of and voluntary participation in the conspiracy. In particular, the government's evidence must overcome the possibility that a particular defendant's association with criminal co-conspirators was wholly innocent or that, if he was with them at the scene of criminal activity, he was "merely present," without guilty knowledge or intent.

The 404(b) evidence admitted against these defendants had probative value as to such issues. For instance, the jury heard evidence that in late September Saniel waited through the night with Vega at a pier. Was this innocent socializing? Even if Vega was waiting for a drug shipment, as he testified, a conscientious juror might well hesitate to infer that Saniel also knew of that purpose and intended to take part. The additional fact that Saniel had previously helped Vega unload and store marijuana might lead the juror to believe that Saniel did know what Vega intended and that he, Saniel, had purposefully decided to lend his assistance. The additional fact thus advances proof of Saniel's knowing and willful participation in the crimes charged in the indictment. [**20]

Similarly, the government needed to counter Santana's claim that he was just a fisherman who liked the waters off

St. Thomas and who was innocently caught up with others who, if they intended a crime, had not told him their purpose. By offering evidence of a second incident in which Santana was involved in a completed drug venture with some of the same participants, the government gave the jury a reason to view skeptically Santana's claim that he was just an innocent bystander who was "merely present," but rather to conclude that he was a knowing and intentional participant in the crimes charged in the indictment. n7

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n7 The common expression notwithstanding, Rule 404(b) does not just apply to "prior" bad acts, but may include subsequent ones as well. See United States v. Wright, 573 F.2d 681, 683 (1st Cir. 1978); Weinstein & Berger, supra, § 404.22[2], at 12.

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The parties debate a bit about whether the evidence of the other crimes tended to show a common "modus operandi" throughout the [**21] various drug ventures. Rule 404(b) does not use the term "modus operandi," and it appears the parties themselves may attach different meanings to it. The government seems to use the term to suggest that common features of the various episodes tend to establish that the defendants were not acting naively or innocently, and that any similarity in the pattern of events was evidence from which the jury could infer that the defendants knew that, on the occasions charged in the indictment, they were involved in a drug importation. The defendants, on the other hand, seem to use the term "modus operandi" to refer to a "signature" crime, where the identity of the criminal is inferred from the distinctive manner in which the crime was committed. They then point out, correctly but irrelevantly, that the identity of the defendants was not an [*120] issue in the case, so the evidence should not have been received for that purpose. Their point is irrelevant because that was not the reason the district court admitted the evidence. Rather, the district court told the jury that the evidence had been

admitted as possible proof of "opportunity, intent, preparation or common plan, knowledge, or absence of mistake, [**22] accident or other innocent reason" for the defendants' activities. (Trial Tr., May 12, 1998, at 17.) n8 It had relevance and probative value for such purposes, and it was admissible under Rule 404(b).

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n8 The district court acted carefully in determining to admit the evidence. Before the trial began, the government advised the court that it intended to offer such evidence and sought permission to refer to it in the opening statement. The court declined to rule on the admission of the evidence in limine, but rather reserved judgment until the appropriate time in the presentation of the government's case. When the government offered the evidence early in its case, the court again demurred and instructed the government first to elicit evidence about the crimes charged in the indictment. After that was done, the government once more sought permission to admit the Rule 404(b) evidence. Since it was near the end of the trial day, the court recessed for the day. The following morning, having consulted the caselaw, the court ruled that the evidence could be admitted. The court gave an appropriate limiting instruction to the jury when the evidence was admitted and again in its final instructions at the close of the case. The defendants claim no error in the instructions.

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[**23]

Staleness and Prejudice

The defendants contend that even if the evidence addressed an issue proper under Rule 404(b), it generated an unfair prejudice n9 that outweighed its probative worth, so it should have been excluded under Rule 403. n10 In particular, the defendants argue that the prior episodes in which Rodriguez and Saniel were involved were too remote in time to have significant probative worth, and instead carried the likely prejudicial effect that the jury would think the defendants were of bad character.

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n9 The law does not protect defendants against all evidentiary prejudice, only that which is unfair. See United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1998) (citing United States v. Rivera-Gomez, 67 F.3d 993, 997 (1st Cir. 1995)).

n10 "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

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[**24]

There is no doubt that the probative value of evidence could be attenuated by the passage of time. n11 See Frankhauser, 80 F.3d at 648; see also United States v. Fields, 871 F.2d 188, 198 (1st Cir. 1989). However, there is no per se rule to determine when a prior bad act is "too old" to be admissible. n12 See Fields, 871 F.2d at 198 (collecting cases); see also United States v. Hernandez-Guevara, 162 F.3d 863, 872 (5th Cir. 1998), cert. denied, 119 S. Ct. 1375 (1999). This Court employs a "reasonableness" [*121] standard that requires evaluation of the particular facts of each case. See Fields, 871 F.2d at 198 (citing United States v. Engleman, 648 F.2d 473, 479 (8th Cir. 1981)).

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n11 It might be observed that the passage of time would similarly attenuate the power of any impermissible suggestion of "propensity" to commit a crime. The older the evidence that a defendant was a bad character, the weaker the force of inference about his present character or propensity. Recall Prince Hal's rebuke to Falstaff: "Presume not that I am the thing I was; For God doth know, so shall the world perceive, That I have turn'd away my former self; . . ." William Shakespeare, The Second Part Of King Henry The Fourth, act 5, sc. 5. [**25]

n12 We note that other circuits have approved Rule 404(b) evidence that was as remote in time from the crime charged in the indictment as the evidence involved in this case. See United States v. Martinez, 182 F.3d 1107, 1112 (9th Cir. 1999) (ten-year-old conviction for drug importation admissible to prove knowledge of drug importation); Hernandez-Guevara, 162 F.3d at 873 (eighteen-year-old conviction for exactly the same type of crime as that charged in the indictment admissible); United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (bad act evidence thirteen years old admitted); United States v. Terry, 702 F.2d 299, 316 (2d Cir. 1983) (twenty-year-old conviction admissible to prove intent and guilty knowledge).

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The judgment whether to admit the evidence at issue is a matter as to which reasonable minds could differ. However, we cannot say it was an abuse of discretion for the district court to have admitted the evidence in question.

There was a striking similarity between the acts alleged in the indictment and the [**26] prior incidents. The similarity of the prior crimes is a factor tending to support admissibility. See Frankhauser, 80 F.3d at 649; United States v. Arias-Montoya, 967 F.2d 708, 712-13 & n.6 (1st Cir. 1992). In the events alleged in the indictment, Rodriguez was the instigator and organizer of the importation efforts. He was the one who had the contacts with the suppliers of marijuana outside Puerto Rico, and he planned the details of the smuggling. He sought out Vega, Saniel and Santana to enlist their help in carrying out his plans. Rodriguez was also the person most knowledgeable -- when the deals fell apart, it was he who bore the news to the others.

Rodriguez had played a similar role in the prior episodes. In the earlier incidents, he initially sought out Vega and Saniel to have them help with an importation of marijuana from Colombia, and he directed events. When there were problems, whether they involved money or the quality of the marijuana, he attended to them.

This evidence that Rodriguez, Vega and Saniel had conducted quite similar operations in the past had a "special relevance" to the present indictment that justified its admission [**27] under Rule 404(b), and the relevance was strong enough that the danger of unfair prejudice was significantly diminished, notwithstanding the passage of time. For instance, a juror might have wondered why she should believe Vega's testimony that Rodriguez unexpectedly called him up and got him involved, with apparently little cajoling, in an effort to import a sizable quantity of marijuana. The 404(b) evidence suggested an answer to that: Vega had previously responded to Rodriguez's call for help with a drug deal. It might have been a different matter if the evidence had suggested an otherwise innocent, on-going relationship between the two men as of 1993. If there had been evidence of regular, non-criminal contacts, the inference that there was a nefarious purpose to their association on any particular occasion would have been much attenuated. But instead, the very rarity of their association tended to suggest that when they got together each of them understood that the purpose was to import drugs.

The subsequent episode in which Santana participated carried far less danger of prejudice than the older ones. It was close in time to the crime charged in the event, and it had significant [**28] similarity in details: after a planning meeting with others at "Fred's" apartment complex in St. Thomas, Santana took his boat to sea and picked up drugs to be smuggled into Puerto Rico. Moreover, it was neither set up nor monitored by the government; it was not an attempt by the government to create a second opportunity to catch Santana. Rather, Vega testified that he participated in it without the government's knowledge, as a criminal venture of his own.

We are mindful that the trial judge "has savored the full taste of the fray, and his considerable discretion must be respected so long as he does not stray entirely beyond the pale." United States v. Tierney, 760 F.2d 382, 388 (1st Cir.

1985). We conclude that the district court did not abuse its discretion in deciding that the probative value of the evidence of the defendants' participation in other drug offenses was more substantial than its prejudicial effect.

There was no error in the admission of the "other crimes" evidence. [*122]

D. Improper Argument

Failure to Testify

Santana testified at trial; the others did not. Rodriguez and Saniel argue that during the closing argument, the prosecutor referred [**29] to their failure to testify when commenting on Vega's veracity. Posing a rhetorical question, the prosecutor attempted to bolster Vega's credibility after it had been attacked by the defendants:

[THE GOVERNMENT] How easy would it have been to catch [Vega] in a lie if it turned out that Israel Rodriguez was on vacation somewhere else? He comes with his American Express record and says, 'Mira. I was in Spain the whole month of September.'

(Trial Tr., May 15, 1998, at 74-75.)

Rodriguez and Saniel objected, arguing that the remark suggested the jury should draw an inference from Rodriguez's silence. The district court agreed and immediately gave a curative instruction reminding the jurors that the defendants had a right not to testify and that they had no burden of proof. n13 In addition, the court gave similar instructions during its final charge to the jury. n14

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n13 [THE COURT] "Members of the jury, although I will be instructing you in a minute about a number of items, including the item that I'm going to talk about now, I just want to advance an instruction, if you will, which perhaps I should do to avoid any misinterpretation of what I will say later, which is the fact that the defendants have no burden to produce any evidence or to testify. They are presumed innocent, and because of that reason, the law says that they have no burden to testify or to produce evidence.

So with that in mind, I will ask [the Government] to continue . . . ." (Trial Tr., May 15, 1998, at 77.) [**30]

n14 [THE COURT] "Remember that the defendants have the right not to testify or to call any witness. Each defendant has the right to remain silent, and no adverse inference or suggestion of guilt could be drawn if their evidence -- from their silence -- I'm sorry -- or from their choice of witnesses." (Trial Tr., May 15, 1998, at 92.)

"The presumption of innocence until proven guilty means that the burden of proof is always on the Government to satisfy you that a defendant is guilty of the crime with which he is charged beyond a reasonable doubt. . . .

This burden never shifts to the defendant. It is always the government's burden to prove each of the elements of the crime or crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from the evidence." Id. at 96.

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We agree that the prosecutor's remark amounted to an impermissible comment on the defendants' decision not to testify. "Even an indirect or inferential comment on a defendant's silence can transgress the Fifth Amendment." United States v. Taylor, 54 F.3d 967, 978 (1st Cir. 1995). [**31] To determine whether there was error requiring reversal of the verdict, however, we must also assess "(1) whether the prosecutor's misconduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court's instruction likely could have affected the outcome of the case." United States v. Palmer, 203 F.3d 55, 58 (1st Cir. 2000)(quoting United States v. Auch, 187 F.3d 125, 129 (1st Cir. 1999)).

As to the first question, we think the prosecutor's comment so obviously pointed out that Rodriguez had not produced evidence contradicting the government's case that it had to have been deliberate. It was not just a slip of the tongue.

Nevertheless, the district court promptly gave an instruction that told the jury not to consider the inference suggested by the prosecutor. The court repeated the caution in its final instructions. The defendants can get no support from United States v. Hardy, 37 F.3d 753, 757 (1st Cir. 1994), which they cite. The district court's response in this case was direct and complete, unlike the elliptical instruction we [**32] disapproved of in Hardy.

The prosecutor's remark was brief, and the court's response was immediate and clear. In the circumstances, we are confident [*123] the remark did not deprive the defendants of a fair trial.

Witness Vouching

The defendants also argue that the prosecutor improperly vouched for Vega's credibility in his closing argument in three ways by: (1) suggesting that Vega needed to move his family from Puerto Rico to keep them safe from possible reprisals for his testimony; n15 (2) arguing that in a prior case, where Vega had been a cooperating witness, the trial judge had given Vega a sentence that was more lenient than what the Government had recommended; n16 and (3) arguing that Vega was "a free man," who, if lying about the guilt of the co-conspirators could "go to jail for a long, long, long time." n17 (Trial Tr., May 15, 1998, at 78-82.)

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n15 [THE GOVERNMENT] "If you would believe that Francisco Vega Estrada would come to testify so that he would be forced to move his family from the house that he --

[COUNSEL FOR RODRIGUEZ] Objection, Your Honor.

[THE COURT] Overruled.

[THE GOVERNMENT]--that he had lived in for over 20 years just so that he could come here and tell lies about these defendants, I submit is absolutely not believable." (Trial Tr., May 15, 1998, at 78.) [**33]

n16 [THE GOVERNMENT] "In 1995, Francisco Vega testifies against Pocholo, and then on May 17th of 1996

he is punished. He is sentenced to ten months; five months in jail and five months in home confinement. He told you the Government told the judge he should go to jail for longer. The Government recommended a longer sentence than ten months, but it was the judge who looked at Mr. Francisco Vega, looked at the fact that he had testified, looked at the risks he had placed himself and his family under.

[COUNSEL FOR RODRIGUEZ] Objection. Objection.

[THE COURT] Overruled." (Trial Tr., May 15, 1998, at 79.)

n17 [THE GOVERNMENT] "Why would a person who has already come out of jail -- he's in his house, he's free. He's paid his debt to society, the punishment imposed by the judge. . . . What possible motive would [Francisco Vega] have?

. . . .He doesn't have to provide any information to the Government about these people. He's a free man. He's a free man.

So by pointing the fingers at these gentlemen (indicating), he does several things. One, if the Government believes that he's lying about that, he can go to jail for a long, long, long time. Two, he's making enemies out of the friends that he once had. And if you believe his testimony, they're drug traffickers. And making enemies of drug traffickers is not something that people go around --

[COUNSEL FOR SANTANA] Objection, Your Honor.

[COUNSEL FOR RODRIGUEZ] Objection.

[THE COURT] Overruled." (Trial Tr., May 15, 1998, at 81-82.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[**34]

It is improper for a prosecutor to make an argument that "places the 'prestige of the government behind a witness by making personal assurances about the witness' credibility.'" United States v. Cruz-Kuilan, 75 F.3d 59, 62 (1st

Cir. 1996) (quoting United States v. Neal, 36 F.3d 1190, 1207 (1st Cir. 1994)). However, an argument that does no more than assert reasons why a witness ought to be accepted as truthful by the jury is not improper witness vouching. See Cruz-Kuilan, 75 F.3d at 62 (citing United States v. Dockray, 943 F.2d 152, 156 (1st Cir. 1991)). While it can sometimes be difficult to tell the difference between a proper argument about the witness' credibility and improper witness vouching, see United States v. Wihbey, 75 F.3d 761, 772 (1st Cir. 1996) (citing United States v. Innamorati, 996 F.2d 456, 483 (1st Cir. 1993)), in this case the first two objectionable arguments made by the government are clearly proper arguments. These arguments were responses to the defendants' claims that Vega was paid for his testimony and that Vega manipulated prosecutors so that he could continue [**35] his illegal activities.

The third portion of the argument, that Vega would be sentenced to jail if he were lying, presents a closer case, but we think it was a proper response to defense arguments that Vega tailored his testimony to [*124] please the prosecutors. The jury had in evidence the agreements Vega made with the government, and those agreements did provide that he could be punished if he testified falsely. The argument properly addressed that point, and did so in response to specific defense arguments.

E. Santana's Sentence

Santana argues that the district court erred in determining his offense level under the United States Sentencing Guidelines because it applied a two-level enhancement under USSG § 2D1.1(b)(2)(B) (Nov. 1998), which requires such an enhancement if "the defendant [has] acted as a . . . captain . . . aboard any craft or vessel carrying a controlled substance." Santana argues that the enhancement would only have been appropriate if he had actually carried out the act of transporting drugs, but is not appropriate for mere conspiracy and attempt.

The argument is frivolous. The offense level for the crimes of conspiracy and attempt is "the base offense [**36] level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." USSG § 2X1.1(a) (Nov. 1998) (emphasis added). The adjustment in § 2D1.1(b)(2)(B) plainly is to be applied to convictions for conspiracy and attempt, so long as the necessary factual predicate for the enhancement exists. Santana does not argue that the district court could not fairly have concluded that he was the captain of a boat intended to be used to carry marijuana. His argument is simply that the substantive crime was not committed. It simply does not matter whether he actually carried the controlled substance; his conspiring and his attempt to do so warrant the application of the enhancement.

At oral argument, Santana argued that there was insufficient basis for the district court to determine, for sentencing guideline purposes, what quantity of marijuana should be attributed to him. He did not raise this objection below, and omitted it from his brief. We consider it waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible [**37] argument in the most skeletal way, leaving the court to do counsel's work . . . ."); see also United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991) ("perfunctory and undeveloped arguments . . . are waived.") (collecting cases). n18

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n18 Santana's other argument that the cooperating witness' testimony violated 18 U.S.C. § 201(c)(2) was considered and rejected in United States v. Lara, 181 F.3d 183, 197-98 (1st Cir.), cert. denied, 145 L. Ed. 2d 338, 120 S. Ct. 432 (1999).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

III.

Having considered all the defendants' arguments, we find no error. The judgments entered by the district court are AFFIRMED.

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APPENDIX D

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED 9-28-04

UNITED STATES DISTRICT COURT
DISTRICT OF PUERT RICO

ISRAEL RODRIGUEZ,
Petitioner

v.

UNITED STATES,
Respondent.

Civil No. 01-2244 (JAF)
(Criminal No. 97-161)

MANUEL RODRIGUEZ-SANTANA,
Petitioner

v.

UNITED STATES,
Respondent.

Civil No. 02-1717 (JAF)
(Criminal No. 97-161)

OPINION AND ORDER

I.

Relevant Procedural Background

On Hay 15, 1998, a jury found petitioners Israel Rodriguez ("Rodriguez") and Hanuel Rodriguez-Santana ("Santana") guilty as charged in the Indictment returned against them on July 30, 1997 (Docket No. 2), to wit: one count of conspiracy to import controlled substances (marijuana), in violation of 21 U.S.C. §§ 952(a) and 963; and, one count of aiding and abetting in the attempt to conspire to import controlled substances (marijuana), in

violation of 21 U.S.C. §§ 952(a) and 963, and 18 U.S.C. § 2. (Docket Document Nos. 92, 93).[1]

On November 25, 1998, this Court sentenced Santana to serve a total of 210 months of imprisonment, followed by a five-year term of supervised release, as to grouped Counts One and Two of the Indictment. A special monetary assessment as to each count was also imposed. (Docket Document Nos. 138-139).

On December 4, 1998, this Court sentenced Rodriguez to serve a total of 188 months of imprisonment, to wit: terms of imprisonment of 188 months (as to Counts One and Two of the Indictment) to be served concurrently with each ether. Concurrent five-year terms of supervised release and a special monetary assessment were also imposed as to each count. (Docket Document Nos. 144-145).

On June 16, 2000, petitioners' convictions and sentences were affirmed by the Court of Appeals for the First Circuit. United States v. Rodriquez, 215 F.3d 110 (1st Cir. 2000), cert. denied, sub nom, Rodriquez v. United States, 532 U.S. 996 (2001). (Docket No. 169).[2]

On September 19, 2001, Rodriguez moved for Section 2255 relief alleging that: (1) appellate counsel's failure to move for a rehearing or certiorari relief from judgment on appeal concerning the Apprendi issue amounted to ineffective assistance; (2) trial counsel's performance was detrimentally affected due to a "conflict of interest" between Rodriguez' and counsel's personal interests.

On May 10, 2002, Santana moved for Section 2255 relief on the following grounds: (1) trial counsel was

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[1] All references are to the criminal docket, unless otherwise noted.The factual background as to the criminal case against the petitioners can be found in United States v. Rodriquez, infra.

[2] Santana filed a petition for rehearing en banc on July 3, 2000. Same was denied on July 19, 2000.

ineffective in failing to move for dismissal of the indictment pursuant to the Speedy Trial Act; (2) counsel was likewise ineffective in failing to move for dismissal of the indictment on jurisdictional and sufficiency grounds; (3) the jury had no evidence to make a finding as to the amount of drugs involved in the offense; and that, (4) the Sentencing Court lacked jurisdiction to impose an enhanced sentence pursuant to Prou v. United States, 199 F.3d 37 (1st Cir. 1999).

II.

Scope of Review

Section 2255 of Title 28, United States Code, provides for availability of collateral relief to attack convictions and sentences imposed by a court without jurisdiction; claims of constitutional error; claims of error of law or fact provided the error is a fundamental defect which results in a complete miscarriage of justice; and claims that the sentence is not within statutory bounds. United States v. Addonizio, 422 U.S. 178, 185-86 (1979).

Under Section 2255, a petitioner is entitled to an evidentiary hearing "[u]nless the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. Therefore, a motion for Section 2255 may only be denied without a hearing if "the petitioner's allegations, accepted as true, would not entitle [him] to relief," Dziurgot v. Luther, 897 F.2d 1222, 1225 (1st Cir. 1990), or if the allegations are not believable as true because "they are contradicted by the record, inherently incredible, or conclusions rather than statements of facts." United States v. Michaud, 925 F.2d 37, 39 (1st Cir. 1991), citing Dziurgot, 897 F.2d at 1225.

"[W]hen, as in this case, a petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing." United States v. McGill, 11 F.3d 223, 225 (1993).

citing United States v. DiCarlo, 575 F.2d 952, 954-55 (1st Cir.), cert. denied, 439 U.S. 834 (1978).

"To succeed in setting aside a conviction premised on ineffective assistance of counsel, a petitioner must establish both constitutionally deficient performance on his attorney's part and concomitant prejudice, or, phrased another way, that the quality of legal representation at his trial was so inferior as to be objectively unreasonable, and that this incompetent lawyering redounded to his substantial detriment." McGill, 11 F.3d at 226, citing Strickland v. Washington, 466 U.S. 668, 689-94, reh'g denied, 467 U.S. 1267 (1984).

III.

Rodriguez' Claims

A. The *Apprendi* Claim

Because, Rodriguez argues, Apprendi, infra, is applicable and beneficial to his case, appellate counsel should have brought said decision to the Court of Appeals' attention prior to its issuance of a mandate or, in the alternative, promptly moved for rehearing and certiorari review. Notwithstanding, Rodriguez filed a pro-se certiorari petition before the U.S. Supreme Court (No. 00-8158) arguing that the 188-month concurrent sentences were illegally imposed because they were based on a drug quantity determination made by the court not by the jury.

The court has already had the opportunity to analyze and discuss the applicability of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt), in the context of the underlying criminal prosecution in this case, in relation to codefendant Juan H. Saniel Calzada's ("Sanlei") request for post-conviction relief. Saniel Calzada v. United States, Civil 00-2569 (JAF).[3]

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[3] On November 20, 1998, this court sentenced Saniel to serve a total of 120 months of imprisonment, to wit: terms of

In his Section 2255 motion, Saniel argued that drug weight and type are elements of the substantive offense that must be included in the indictment and proven to the jury beyond a reasonable doubt. Similar to Rodriguez, Saniel argued that the jury, not the court, was required to make a drug weight and type finding in order to allow imposition of sentence in compliance with the Supreme Court's decision in Apprendi. Dismissing Saniel's request for post-conviction relief, the Court found:

> Petitioner misunderstands the significance of Apprendi in this case. If a defendant's sentence exceeds the statutory maximum, Apprendi holds that drug quantity is an aggravating element of the offense that must be proven to a jury beyond a reasonable doubt. However, Apprendi does not apply where, as here a defendant's sentence falls within the statutory range.

Civil No. 00-2569(JAF), Docket Document No. 3 at 7-8 (internal citations omitted).

In support of his Apprendi claim, Rodriguez has attached copy of the United States' brief in opposition of his request for certiorari before the Supreme Court. (Civil 01-2244[JAF], Docket Document No. 1, App. I-1 to I-12). In its brief, the government argues that, "[b]ecause a fact required to justify the increase in petitioner's sentence above five years -involvement in the offense of at least 50 kilograms of marijuana or at least 100 marijuana plants- was not found by the jury to have been proved beyond a reasonable doubt, it was error under Apprendi to sentence petitioner to more than five years imprisonment based on the drug quantity

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imprisonment of 120 months (as to Counts One and Two of the Indictment) to be served concurrently with each other. Concurrent five-year terms of supervised release and a special monetary assessment were also imposed as to each count. (Criminal No. 97-161[JAF], Docket Document Nos. 134, 141).

determination made by the district court alone." (Civil 01-2244[JAF], Docket Document No. 1, App. I-9 to I-10). Rodriguez, thus, seems to advance the proposition that he should be resentenced pursuant to 21 U.S.C. § 960(b)(4) which authorizes a maximum term of imprisonment of five years applicable to convictions for importation of any quantity of marijuana.[4]

Despite its concession of error,[5] the United States' brief in opposition to Rodriguez' request for certiorari relief also

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[4] We have found several cases supporting the proposition that 21 U.S.C. § 960(b)(4)'s 5-year default statutory maximum is applicable to offenses involving any amount of marijuana. See, United States v. Carranza, 289 F.3d 634, 642 (9th Cir.), cert. denied, 573 U.S. 1037 (2002). See also, United States v. Escobar-Apantenco, 2003 WL 13109 (9th Cir.) (unpublished opinion discussing Apprendi in the context of a guilty plea); United States v. Martinez-Vaca, 2002 WL 1334162 (9th Cir.) (same); United States v. Uriarte, 2002 WL 1050399 (9th Cir.) (same); United States v. CruzCalixto, 2002 WL 746008 (9th Cir) (unpublished opinion holding defendant convicted by jury was not exposed to greater punishment than prescribed in 960[b][4] at sentencing); United States v. Ayala-Horeno 2001 WL 231694 (9th Cir.) (unpublished opinion holding Apprendi inapplicable when court's findings and sentence as to defendant who pled guilty fell below lowest statutory maximum); United States v. Gallardo-Arredondo, 2001 WL 180422 (9th Cir.) (unpublished opinion holding fact findings based on guilty plea did not expose defendant to sentence beyond lowest statutory maximum). Compare, United States v. P6rez-Ruiz, 353 F.3d 1, 15 n.2 (1st Cir. 2003), cert. denied, S.Ct., 2004 WL 595295, 72 U.S.L.W. 3658 (2004) (holding that default statutory maximum for offenses involving marijuana is five years pursuant to § 841[b][1][D]).

[5] In United States v. North, 86 Fed Appx. 427, 437 n.5 (1st Cir. 2004), 2004 WL 100398 (1st Cir.) (unpublished), the government made such a concession before a sister district

anticipates that he would be unable to meet the applicable plain error standard, having failed to raise the Apprendi claim on appeal.[6]

> Petitioner may be hard pressed to meet that standard in this case. The chief prosecution witness, who was involved in the conspiracy and attempt, testified at trial that he believed that the shipment of more than 5,000 pounds of marijuana intercepted by the Coast Guard off the coast of Colombia was the same shipment that petitioner had asked the witness and another coconspirator to meet on the pier in Puerto Rico. There was further testimony from a Customs agent that no other marijuana shipment was intercepted by the Coast Guard in the September-October 1993 period. The Probation Office found that the amount underlying the conspiracy was more

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Although Count Three might have carried a higher sentence since more than 1000 kilograms had been noticed in the indictment and more than 1600 kilograms had been proven at trial, the drug quantity issue had not been submitted to the jury at sentencing., the government agreed that in light of the intervening decision in Apprendi [citation omitted], North should receive only the default statutory maximum (60 months) on this count. This concession seems extremely generous, but the Apprendi issue is not before us.

[6] We note that Apprendi was decided on June 26, 2000, ten days after this Circuit's June 16, 2000 opinion affirming the convictions and sentences in Crim. 97-161(JAF). Rodriguez did not challenge the drug quantity finding for sentencing purposes, but he could not have raised the Apprendi claim at the time. This Circuit certified and issued the judgment as a mandate on July 7, 2000. (Docket No. 171). Rodriguez could have moved for panel rehearing on appeal within 14 days after entry of judgment, Fed. R. App. P. 40, or moved for stay of mandate pending the filing of a petition for a writ of certiorari. Fed. R. App. P. 41

> than 5,000 pounds, and petitioner did not challenge that finding at the sentencing hearing. The 5,000 pounds alleged at trial and attributed by the district court at sentencing is 45 times the 50 kilograms of marijuana required to subject petitioner to a maximum sentence of 20 years under 21 U.S.C. 960(b)(3). Conversely, in order to fall within the statutory category carrying a maximum sentence below the sentence petitioner received, the conspiracy of which the jury found petitioner guilty would have had to involve only 50 kilograms of marijuana. It is difficult to imagine that the jury could have found that the amount of drugs that was the subject of the conspiracy -an amount that required two people and a pickup truck to off-load from the expected beat- was merely 50 kilograms (slightly mere than 100 pounds).

(Civil No. 01-2244[JAF], Docket Document No. 1, App. I-10 to I-11).

The court's determination to dismiss Saniel's Section motion relied on the court's choice of the catchall provision of § 960(b)(3), based on this Circuit's rationale in United States v. LaFreniere, 236 F.3d 41, 49 (1st Cir. 2001) (applying the catchall provision in § 841[b][1][C] as the statutory maximum applicable to distribution offenses involving Schedule I and II controlled substances).

In Derman v. United States, 298 F.3d 34 (1st Cir.), cert. denied, 537 U.S. 1048 (2002),[7] this Circuit analyzed the rule

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[7] The Derman Court relied heavily on the case of United States v. Patterson, 292 F.3d 615 (9th Cir. 2002), reh'q qranted, opinion withdrawn, 359 F.3d 1190 (2004), which upheld a conviction based on a jury finding that the defendant was guilty of manufacturing 100 or more plants, although the jury was not instructed to determine exact amount. Derman, 298 F.3d at 43. Therefore, Derman, in our opinion, has considerably lost precedentiai value.

expounded by the Supreme Court in Edwards v. United States, 523 U.S. 511 (1998),[8] and Apprendi's impact:

> Apprendi, decided two years later, did not purport to overrule Edwards, and the two decisions are easily harmonized: in a drug conspiracy case, the jury should determine the existence vel non of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination). The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole (e.g., that the conspiracy involved at least 1,000 marijuana plants).

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[8] "In Edwards, the Supreme Court held that, as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum applicable to that conspiracy, the court may determine both the amount and the kind of controlled substances for which the defendant should be held accountable and then impose a sentence that varies depending upon amount and kind." Derman, 298 F.3d at 42 (emphasis in the original; internal citations and quotations omitted).

Derman, 298 F.3d at 42-43 (emphasis in the original; internal citations omitted).

More recently, the First Circuit Court of Appeals revisited Apprendi in Perez Ruiz, 353 F.3d at 16, holding that the jury's findings are ascertainable through: the indictment, which puts the defendant on notice of the maximum sentence exposure; the "[t]he jury instructions [which] must supply a proper linkage;" and, a special verdict form. In the instant case, as in P6rez Ruiz, aside from the drug type and quantity allegations charged in the indictment, there was no special verdict form or suitably focused jury instruction.

> In drug-trafficking cases involving Apprendi errors, we sometimes have treated the presence of "overwhelming evidence" of the requisite drug types and quantities as a proxy for harmlessness. Under that formulation, an error involving the failure to submit appropriate drug type and quantity questions to the jury can be viewed as harmless if overwhelming evidence adduced at trial shows that, during the time frame described in the indictment, the conspiracy encompassed types and quantities of drugs sufficient to trigger a statutory maximum equal to or above the sentence actually imposed on the individual defendant.

Perez Ruiz, 353 F.3d at 18 (internal citations omitted).

In the instant case then, as in Perez Ruiz, we must examine whether there was "overwhelming evidence" that the charged conspiracy to import involved a minimum amount of 50 kilograms of marijuana so as to render the Apprendi error harmless beyond a reasonable doubt.[9]

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[9] On appeal, the defendants argued that the jury could not have found beyond a reasonable doubt that the marijuana seized was the in fact the marijuana that they planned to import. The Circuit did not need to decide this issue because the government was not required to prove the overt act. Therefore, although ample proof concerning the seizure of

In the instant case: (1) the indictment specified the drug type and quantity, placing Rodriguez and his codefendants on notice of their exposure to a sentence above the default statutory maximum; and (2) the government proved "beyond a reasonable doubt that the conspiracy involved the requisite drug quantity necessary to elevate the applicable statutory maximum to the next level," see, Derman, 298 F.3d at 43.

At trial, U.S. Customs Service Senior Special Agent Pedro Vicons testified that cooperating codefendant Francisco Vega ("Vega") had alerted the impending arrival of a drug shipment. Surveillance was mounted and called off in the early morning hours. Vega called him several days later to advise that the marijuana load had been "caught in the high seas." Vicons recalled that the Coast Guard seized a drug-laden vessel whose shipment consisted of "several hundred pounds of marijuana." (Trial Transcript Docket Document No. 155 at producing party. 48-51). U.S. Customs Service Special Agent Hector Marte further testified that the seized contraband was offloaded at the Roosevelt Roads U.S. Naval Base in Ceiba, Puerto Rico, where it was field tested and weighed, yielding positive results to marijuana and weighing over 5,000 pounds. (Trial Transcript Docket No. 155 at producing party. 70-71).[10] Samples of the seized contraband were relayed to the Drug Enforcement Administration Laboratory in Miami, Florida, for analysis, which confirmed that a total of 1,305.3 grams (gross weight) of marijuana (5,320 pounds) had been seized. (Trial Transcript Docker No. 155 at producing party. 72-73). The parties stipulated that the laboratory results identified the substance seized as marijuana. (Trial Transcript Docket No. 155 at p. 73).

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the vessel and its contents was presented at trial, the jury's verdict could have disregarded evidence of this overt act. Rodriquez, supra; Docket No. 169, slip op. at 11-12.

[10] Photographs depicting the seized vessel and marijuana were admitted as Government's Exhibits 17-18, respectively. (Trial Transcript Docket No. 155 at p. 70).

It stands to reason that in this case "during the time frame described in the indictment, the conspiracy encompassed types and quantities of drugs sufficient to trigger a statutory maximum equal to or above the sentence actually imposed on [Rodriguez]" rendering the Apprendi error harmless beyond a reasonable doubt. Pórez Ruiz, 353 F.3d at 18.[11]

1. Trial Counsel's Conflict of Interest

Rodriguez alleges that counsel failed to render ineffective assistance because she represented "inconsistent interests" which interfered with her performance and duties in connection with his case. Rodriguez lists the "inconsistent interests" as (1) counsel's medical problems, (2) a pending disciplinary action against her before the First Circuit Court of Appeals (98-8022), and (3) her interest in receiving payment for her services from Rodriguez.

Counsel originally requested a one-week postponement of the trial, until May 11, 1998, citing her work on another trial, the need to conduct additional debriefings in Rodriguez' case, and the stress en her health should she have to try Rodriguez' case back-to-back with another. (Docket No. 69). Counsel, an experienced litigator, requested a postponement of the trial which was granted by the court. (Docket Document Nos. 71, 73). Counsel requested another postponement and moved to withdraw as counsel following the publication of a newspaper article concerning pending disciplinary proceedings against her before the First Circuit

[11] We pay no heed to Rodriguez' reference to the opinion of "marijuana experts from prison" as to his pick-up truck's lack of capacity to haul the marijuana shipment, the depiction of a pick-up truck allegedly similar to his, nor his inference that this somehow debilitates the jury's factual determination concerning the amount of marijuana. (Civil Docket No. 1 at 67, and Exhibit H).

Court of Appeals; she also cited health reasons. (Docket Document No. 74; Civil Docket 01-2244[JAF] Exhibits G-3 and J).[12] The court denied further postponement and permission to withdraw in its Order of Hay 8, 1998, upon finding that the disciplinary proceedings did not render counsel unable to represent her client effectively as it dealt with her failure to file an appellate brief; the court also stated that it would pay special attention to the matter of pretrial publicity raised by counsel during jury selection. (Docket Document No. 75).

Thereafter, counsel again moved for postponement, this time citing only health reasons. (Docket Document No. 76; Civil Docket 01-2244[JAF] Exhibit K). The court is aware of the sacrifices of private practice especially upon sole practitioners, and has presided over many proceedings in many of which counsel for Rodriguez has appeared as defense counsel. Counsel appeared before the court in a composed fashion and fully prepared to try the case. Whatever stress or illness she felt on the eve of the commencement of trial was "mooted" once she assumed her typically forceful and keen performance in the courtroom arena. Counsel interposed her objections in a timely and well-argued fashion, bearing her usual professional and poised demeanor. The court never bore any doubts

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[12] The First Circuit Court of Appeals ultimately entered judgment publicly reprimanding counsel for her failure to file a brief in a timely fashion and respond to orders of the Court. The Court recognized counsel's effort to mitigate any misconduct by her prior commitment to take a practice management seminar to avoid recurrence of similar conduct. In Re: Maria H. Sandoval, No. 98-8022 (1st Cir. May 25, 2000); Civil Docket 01-2244(JAF) Exhibit L4-L6. It stands to reason that, contrary to Rodriguez' claims, the pendency of disciplinary proceeding would raise counsel's awareness as to all matters concerning her clients' representation.

concerning counsel's ability to defend Rodriguez, as she zealously did.

As to counsel's interest in being paid by Rodriguez for her services, Rodriguez misstates the record. Counsel's reference to Rodriguez' ability to pay for her services was brought in the context of his financial condition at sentencing so that he be declared indigent for appellate purposes,[13] (Sentencing Transcript Docket Document No. 178 at 26-27).

Rodriguez' assertions concerning ineffective assistance of counsel at trial and sentencing find no support in the record as a whole, which contradicts his self-serving allegations that counsel's conduct so undermined the proper functioning of the adversarial process that the outcome of the trial cannot be relied upon as having produced just results. Trial counsel filed a vast array of well-pled motions and sound arguments throughout the proceedings, was always well-prepared and exhibited sound knowledge of the law and the facts of the case. Counsel certainly tested the prosecution's case zealously even in the face of overabundant evidence.

Simply put, Rodriguez has not overcome the "strong presumption" that he received effective legal assistance, Strickland, 466 U.S. at 689 (1984).

B. Ineffective Assistance of Counsel on Appeal

The Court of Appeals' opinion in this case indicates that appellate counsel briefed the case thoroughly and conscientiously. After the appeal was decided, there was no request for rehearing and retained counsel, G. Richard Strafer, did not file a certiorari petition before the U.S. Supreme Court pursuant to Apprendi, which was decided by the Supreme Court on June 26, 2000, ten days after this Circuit's June 16, 2000, opinion affirming Rodriguez' conviction and

[13] Rodriguez did not pursue this matter and retained G. Richard Strafer as appellate counsel.

sentence in Criminal No. 97-161(JAF). Rodriguez eventually filed a pro se petition for a writ of certiorari before the Supreme Court, and the same was summarily denied.

In sum, the alleged Apprendi error was harmless, there being no actionable ineffective assistance of counsel argument against Petitioner's trial attorney, and no identifiable refusal on the part of appellate counsel under his professional services contract with Rodriguez to continue pursuing the matter after the Court of Appeals decided the case.

IV.
Discussion of Santana's Claims

A. Ineffective Assistance of Counsel

Santana claims that counsel should have: requested dismissal of the indictment on grounds of sufficiency and Speedy Trial Act violations; moved for exclusion of the testimony of the cooperating codefendant; and, moved for suppression of evidence of other bad acts under Fed. R. Evid. 404(b).

These issues are unsubstantiated by the record. There was no speedy trial violation and no legal basis to exclude the testimony of the cooperating codefendant who was amply cross-examined by the defense. (Docket Document No. 154 at 62-109; Docket Document No. 155 at 4-31). The admission of the Rule 404(b) evidence was challenged at trial (Docket Document No. 84 at 3-9, 32-34, 36-37; Docket Document No. 86 at 14-16), addressed by the court (Docket Document No. 80), and its admissibility upheld on appeal.[14] Claims as to the sufficiency of the evidence to support the verdicts and the constructive amendment of the indictment were likewise rejected on appeal.

[14] By order of the court, the United States had briefed the Rule 404(b) issue. (Docket Document No. 80)

B. The Amount of Druqs and Apprendi

Santana raises a claim under Apprendi apparently for the first time.[15] We refer to the discussion of Rodriguez' Apprendi claim above as applicable to Santana, and with the same results.

C. Court's Jurisdiction to Impose an "Enhanced Sentence"

We need not address the issue of the two-level enhancement imposed pursuant to U.S.S.G. § 2Dl.l(b) (2) (B) (November 1998), which was denied on appeal as frivolous. However, Santana seems to refer to the court's enhancement of his sentence based on the filing of an "information." In his argument, Santana confuses "information," pursuant to 21 U.S.C. § 851(a), with "information" concerning prior convictions warranting a Criminal History Category of IV. (Docket Document Nos. 138-139, and 160 [Sentencing Transcript] at 11). Santana's sentence was not imposed pursuant to an § 851 information. Santana's reliance on Prou v. United States, 199 F.3d 37 (1st Cir. 1999) is inapposite as a result of his confusion with the legal terminology.

D. Prosecutorial Misconduct

Santana also alleges that instances of prosecutoriai misconduct in the case (alleging that evidence was fabricated, perjured testimonies coached, purchased, and elicited, etc.) and pervasive in this district warrant vacation of his conviction. Rather than allegations based on the record of the

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[15] According to the docket on appealf on July 3f 2000f Santana filed a petition for rehearing en banc, which was denied on July 19, 2000. Santana does not indicate that the Apprendi issue was raised in said petition.

case, Santana advances arguments based on speculations which the court should not address.

V.

Conclusion

In accordance with the foregoing, summary dismissal, as outlined above, of petitioners' requests for relief under 28 U.S.C. S 2255 is appropriate, pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 28th day of September, 2004.

S/Jose Antonio Fuste
JOSE ANTONIO FUSTE
CHIEF U.S. DISTRICT JUDGE

APPENDIX E

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED 1-26-05

UNITED STATES DISTRICT COURT
DISTRICT OF PUERT RICO

ISRAEL RODRIGUEZ,
Petitioner

v.

UNITED STATES,
Respondent.

Civil No. 01-2244 (JAF)
(Criminal No. 97-161)

ORDER

Petitioner, Israel Rodriguez, requests a certificate of appealability from this court to appeal our denial on September 28, 2004, of his 38 U.S.C. § 2255 petition. See § 2253 (c)(2) (1996).

A certificate of appealability may be granted only upon a substantial showing of the denial of a constitutional right. 28 U.S.C. §§ 2253 (c)(2) and (3) (1996). Upon reviewing the record, we find Petitioner's claim entirely insubstantial for the reasons stated in our Opinion and Order of September 28, 2004, Docket Document No.5. Accordingly, we DENY Petitioner's request for a certificate of appealability, Docket Document No.10.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of January, 2005.

S/Jose Antonio Fuste
JOSE ANTONIO FUSTE
CHIEF U.S. DISTRICT JUDGE

APPENDIX F

SUPREME COURT DENIAL OF CERTIORARI
DATED 4-23-01

532 U.S. 996; 121 S. Ct. 1658;
149 L. Ed. 2d 640; 2001 U.S. LEXIS 3266, *
ISRAEL RODRIGUEZ v. UNITED STATES
00-8158
SUPREME COURT OF THE UNITED STATES
532 U.S. 996; 121 S. Ct. 1658; 149 L. Ed. 2d 640; 2001 U.S. LEXIS 3266; 69 U.S.L.W. 3686
April 23, 2001, Decided

PRIOR HISTORY: [*1] Reported below: 2000 U.S. App. LEXIS 14141.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for a writ of certiorari to the United States Court of Appeals for the First Circuit denied.

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APPENDIX G

GOVERNMENT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI CASE #00-8158

No. 00-8158

IN THE SUPREME COURT OF THE UNITED STATES
ISRAEL RODRIGUEZ, PETITIONER
V.
UNITED STATES OF AMERICA
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARABARA D. UNDERWOOD
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QUESTION PRESENTED whether the district court committed plain error by sentencing petitioner for conspiracy and attempt to import illegal drugs, in violation of 21 U.S.C. 963, in the absence of a jury finding as to the quantity of drugs involved in petitioner's offenses.

IN THE SUPREME COURT OF THE UNITED STATES
No. 00-8158
ISRAEL RODRIGUEZ, PETITIONER
V.
UNITED STATES OF AMERICA
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. Al-A15) is reported at 215 F.3d 110.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2000. The petition for a writ of certiorari was untimely filed on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on one count each of conspiring and of attempting to import marijuana in violation of 21 U.S.C. 963. Petitioner received concurrent sentences of 188 months, imprisonment, to be followed by five years, supervised release. Pet. App. B6. The court of appeals affirmed. Pet. App. Al-A15.

1. In September 1993, petitioner planned to smuggle marijuana into Puerto Rico and sought the help of Juan Saniel Calzada ("Saniel") and Francisco Vega Estrada ("Vega"). Pet. App- A2; Gov't C.A. Br. 7, 22-23. Saniel became a co-defendant in this case; Vega was a cooperating unindicted co-conspirator. Pet. App. A2. On September 29 or 30, 1993, Saniel and Vega, having agreed to assist in the drug importation, drove in Vega's pickup truck to a pier in a location designated by petitioner on the eastern coast of Puerto Rico and waited for the boat carrying the marijuana, expecting to load the marijuana into the truck. Pet. App. A2; Gov't C.A. Br. 7, 23. No boat arrived, but in the early morning they heard a radio report that a boat carrying more than 5,000 pounds of marijuana had been seized that night by the Coast Guard, about 45 miles off the coast of Colombia Pet. AppA3; Gov't C.A. Br. 8. Vega subsequently testified that he went home to bed, assuming that the load that was seized was the one he and Saniel were waiting for. Pet. App. A3. Petitioner later told Vega that the expected shipment had

"fallen through," which Vega understood to mean that the shipment had been intercepted. Pet. App. A3; Gov't C.A. Br. 24, 56-57.

In October 1993, petitioner organized a second attempt to import illegal narcotics, including marijuana and cocaine, this time involving a second co-defendant, Manuel Rodriguez-Santana

("Santana"), as well as Vega and some other men. Pet. App. A3; Gov't C.A. Br. 9. The plan was for the drugs to be received at sea, off the coast of St. Thomas, and then to be brought into Puerto Rico by boat. Ibid. After the wen had assembled in St. Thomas, petitioner informed them that the expected shipment had been canceled. Ibid.

2. The indictment charged petitioner with one count of conspiring to import more than 5,000 pounds of marijuana, and one count of attempting to import more than 5,000 pounds of marijuana, both in violation of 21 U.S.C. 963. Indictment 1-2, 6. At trial, Vega testified for the government about both of the attempted importations. He was also permitted to testify, pursuant to Federal Rule of Evidence 404(b), about the defendants' "other crimes," including two involving petitioner. Pet. App. A3-A4. Vega testified that an two prior occasions, one in 1978 or 1979 and the other in 1980, he had participated with petitioner in actually importing marijuana into Puerto Rico from Colombia. Ibid. Customs agents also testified at trial, and telephone records were introduced indicating multiple telephone contacts among the various participants, as well as between petitioner's residence and telephone numbers in Colombia, during September and October 1993. Pet. App. A3; Gov't C.A. Br. 9-IS. The jury returned a verdict of guilty on both counts. Pet. App. A5.

3. At sentencing, the judge grouped the two counts of conviction together pursuant to Section 3D1.2(d) of the Sentencing Guidelines. Pet. App. B5. The judge attributed 5,000 pounds of marijuana to petitioner, as had the indictment and the presentence report. That resulted in a base

offense level of 32 pursuant to Guidelines § 2D1.1. Ibid. The judge added a four level enhancement to reflect the tact that defendant was the organizer or leader of a criminal activity involving five or more people. Ibid. Petitioner's offense level of 36 and his criminal history category of I yielded a sentencing range of 188-235 months, imprisonment. The judge sentenced petitioner to 188 months, imprisonment on each count, to be served concurrently. *Id.* at B6.

4. On appeal, petitioner and his co-defendants challenged the sufficiency of the evidence. They also argued that the jury could not have found beyond a reasonable doubt that the marijuana shipment intercepted by the Coast Guard off the coast of Colombia was the shipment that petitioner intended to bring to Puerto Rico and that the government's failure to prove that fact constituted an improper constructive amendment to the indictment. The defendants further argued that the district court erred in admitting Vega's testimony about their "other crimes." Petitioner and one other defendant also contended that during closing argument the prosecutor had improperly referred to their failure to testify. Finally, the defendants argued that the prosecutor improperly vouched for the credibility of his principal witness, Vega. The court of appeals affirmed the convictions in all respects. Pet. App. A1-A15. In particular, on the question of constructive amendment of the indictment -which the court treated as applying only to the conspiracy count -- the court held that even if the government had not proved beyond a reasonable doubt that the intercepted marijuana shipment was petitioner's (a question, the court of appeals said, that it "need not resolve"), that would not amount to an improper amendment of the indictment because the conspiracy charged was not linked to a particular shipment and did not require proof of an overt act. Pet. App. A7.

ARGUMENT

1. Petitioner's petition for a writ of certiorari, due on September 14, 2000, was filed substantially out of time, on January 22, 2001. While this Court has discretion to

consider an untimely petition for a writ of certiorari in a criminal case, see *Schacht v. United States*, 398 U.S. 58 (1970), petitioner offers an insufficient explanation for the delay of more than four months in his submission. Petitioner asserts that a motion for extension of time "was timely deposited in the prison mail collection box on 9-13-00" (Pet. 2) and further contends that he "does not know why his motion for extension of time was postmarked 10-3-00 and was not postmarked on 9-13-00 when he placed it in the prison mail collection box" (Pet. App. EY. This Court's Office of the Clerk initially rejected that motion for failure to comply with this Court's rules and rejected subsequently renewed motions as untimely filed. (Pet. App. D, F, and H).

Petitioner's explanation for requesting an extension was that, "shortly before" the deadline for filing the petition, he "received information that his appellate counsel declined to file a petition for Writ of Certiorari" and that "due to his incarceration and prison job, he has limited access to lawbooks, typewriters and copy machines." Pet. App. El. In his resubmitted application for extension of time dated October 18, 2000, however, petitioner sought "an extension of time of 30 days from the date that the Court rules on this motion for extension of time, or until 11-30-00 to file the petition for Writ of Certiorari." Pet. App. E4. The Clerk's Office of this Court denied the request for extension of time by letter of October 23, 2000. Pet. App. F. Thirty days from that date would have been November 22, 2000. Petitioner has given no explanation at all why his petition was filed two months beyond the last day of the extension period that he had requested.[1] Accordingly, this Court should decline to

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[1] Petitioner does assert that he did not receive the Clerk's October 23 rejection of his renewed extension motion until November 21. Pet. App. G5. The record also reflects that he again resubmitted the extension motion in early December, this time requesting "an extension of time up to and including 12-3100 or 30 days from the date of the

exercise its discretion to review a petition that was filed more than four months late and without adequate explanation for that delay. Cf. *Schacht*, 398 U.S. at 64 (petitioner filed affidavits showing that he "had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control").

2. On the merits, petitioner argues that his 188-month sentence on each count was imposed in violation of this Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), because the district court, rather than the jury, determined the quantity of marijuana that was the subject of the conspiracy and attempt to import. Pet. App. 9. In *Apprendi*, the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must he submitted to a jury, and proved beyond a reasonable doubt." Id. at 2361-2363.

Petitioner's 188-month sentence on the charges of conspiring and attempting to import marijuana is authorized by 21 U.S.C. 960(b)(3), which authorizes a maximum term of 20 years' imprisonment for violations of 21 U.S.C. 963 that involve at least 50 kilograms of marijuana or at least 100 marijuana plants. His sentence on those counts is not authorized, however, by Section 960(b)(4), which authorizes a term of imprisonment of not more than five years for a defendant without a prior drug conviction who has been found guilty of a drug offense involving any quantity of marijuana. ***Because a fact required to justify the increase in petitioner's sentence above five years -involvement in the offense of at least 50 kilograms of marijuana or at least 100 marijuana plants -- was not found by the jury to have been***

Court's decision on his motion for extension of time, whichever is determined appropriate by the Court." Pet. App. G6. There is no explanation, however, of the need for that additional request for time nor of the additional time taken past the second extension deadline that was requested.

proved beyond a reasonable doubt, it was error under Apprendi to sentence petitioner to more than five years, imprisonment based on the drug quantity determination made by the district court alone.

Petitioner, however, did not raise his *Apprendi* claim in either court below. The claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 834 (2001); *United States v. Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000). The district court's error in imposing 188-month sentences on the conspiracy and attempt counts based on findings made by the court at sentencing was "plain," in that the error was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."); *Nordby*, 225 F.3d at 1060. Petitioner is not entitled to relief, however, unless he can also demonstrate that this error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Petitioner may be hard pressed to meet that standard in this case. The chief prosecution witness, who was involved in the conspiracy and attempt, testified at trial that he believed that the shipment of more than 5,000 pounds of marijuana intercepted by the Coast Guard off the coast of Colombia was the same shipment that petitioner had asked the witness and another coconspirator to meet on the pier in Puerto Rico. There was further testimony from a Customs agent that no other marijuana shipment was intercepted by the Coast Guard in the September-October 1993 period. The Probation Office found that the amount underlying the conspiracy was more than 5,000 pounds, and petitioner did

not challenge that finding at the sentencing hearing.[2] The 5,000 pounds alleged at trial and attributed by the district court at sentencing is 45 times the 50 kilograms of marijuana required to subject petitioner to a maximum sentence of 20 years under 21 U.S.C. 960(b)(3). Conversely, in order to fall within the statutory category carrying a maximum sentence below the sentence petitioner received, the conspiracy of which the jury found petitioner guilty would have had to involve only 50 kilograms of marijuana. It is difficult to imagine that the jury could have found that the amount of drugs that was the subject of the conspiracy -- an amount that required two people and a pickup truck to off-load from the expected boat -- was merely 50 kilograms (slightly pare than 100 pounds). Nevertheless, that is an issue that would appropriately be considered by the court of appeals in the first instance. Accordingly, ***if this Court exercises its discretion to review this untimely petition, the case should be remanded to the court of appeals for further consideration of petitioner's sentence on Counts 1 and 2 in light of Apprendi.*** Otherwise, it should be denied because it is out of time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD

Acting Solicitor General

JOHN C. KEENEY

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[2] As previously noted, petitioner did argue on appeal -- in the context of his allegation that there had been a "constructive amendment of indictment" -- that the jury could not have found beyond a reasonable doubt that the shipment intercepted by the Coast Guard was the shipment he directed Saniel and Vega to wait for on the pier.

Acting Assistant
Attorney General
JAMES E. CASTELLO
Attorney
MARCH 2001

(emphasis added)